

COMPLAINT (article 26) - 1985 - FEDERAL REPUBLIC OF GERMANY - C111

1. Referred by decision of the Governing Body of its own motion (article 26, paragraph 4)

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REPORT OF THE COMMISSION OF INQUIRY appointed under article 26 of the Constitution of the International Labour Organisation to examine the observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), by the Federal Republic of Germany

Complaint Procedure

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). (Endnote 1) 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. (Endnote 2) 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. (Endnote 3) 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 member) and Mr. Heribert Maier (Worker 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, (Endnote 4) to refer the matter to a Commission of Inquiry, in accordance with article 26, paragraph 4, of the Constitution. (Endnote 5)

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.

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.

23. The Commission decided to afford an opportunity to the World Federation of Trade Unions to submit additional information and observations. The organisation was requested to send any such information and observations by 31 January 1986.

24. By virtue of article 27 of the ILO Constitution, all member States, whether or not directly concerned by a matter referred to a Commission of Inquiry, are bound to place at the disposal of the Commission all information in their possession which bears upon the subject-matter of the inquiry. Bearing in mind that the present case related to employment in the public service, the Commission decided to invite the Governments of countries neighbouring upon the Federal Republic of Germany (namely, Austria, Belgium, Czechoslovakia, Denmark, France, the German Democratic Republic, Luxembourg, Netherlands and Switzerland) to communicate such information.

25. An invitation to communicate information to the Commission was also addressed to several organisations having consultative status with the ILO, namely, the International Confederation of Free Trade Unions, the World Confederation of Labour, and the International Organisation of Employers. A similar invitation was addressed to the following organisations in

the Federal Republic of Germany: Bundesvereinigung der Deutschen Arbeitgeberverbände (Confederation of German Employers' Associations), Deutscher Gewerkschaftsbund (German Confederation of Trade Unions), Gewerkschaft der Eisenbahner Deutschlands (German Railway Workers' Union), Gewerkschaft Erziehung und Wissenschaft (Educational and Scientific Workers' Union), Gewerkschaft Öffentliche Dienste, Transport und Verkehr (Public Service, Transport and Communication Workers' Union), Deutsche Postgewerkschaft (German Postal Workers' Union), Deutscher Beamtenbund (German Officials' Federation), Verband Bildung und Erziehung (Training and Education Association), Deutscher Lehrerverband (German Teachers' Association).

26. The Commission requested the above-mentioned governments and organisations to submit any information by 31 January 1986. It informed them that any such information would be transmitted to the Government of the Federal Republic of Germany and to the World Federation of Trade Unions.

27. The Commission informed the Government of the Federal Republic of Germany that any additional information and observations which it might wish to submit should be communicated by 15 March 1986.

28. The Commission decided to hold its second session in Geneva from 14 to 25 April 1986, and to proceed to the hearing of witnesses during that session. It adopted rules for the hearing of witnesses, which it communicated to the Government of the Federal Republic of Germany and to the World Federation of Trade Unions. (Endnote 6)

29. The Commission requested the Government to communicate, by 31 January 1986, the names and descriptions of witnesses whom it wished the Commission to hear in the course of the second session. The Commission indicated that it would like to hear evidence from persons qualified to speak about the situation in regard to the matters which were the subject of the inquiry both at the federal level and at the level of the Länder. It also informed the Government that it would like to hear evidence from a representative of the German Confederation of Trade Unions and from witnesses appearing on behalf of certain organisations of persons employed in the public sector, such as officials in the public administration, teachers and postal workers. The Commission requested the Government to consult the organisations in question and to take the necessary measures with a view to the attendance of such witnesses.

30. The Commission likewise requested the World Federation of Trade Unions to communicate, by 31 January 1986, the names and descriptions of any witnesses whom it wished the Commission to hear in the course of the second session, together with a brief indication of the matters on which it was desired to adduce the evidence of each of them. The Commission indicated that it would decide, on the basis of these indications, whether to hear the witnesses in question. It requested the organisation to make the necessary arrangements for their attendance before the Commission.

31. The Commission requested the Government of the Federal Republic of Germany to ensure that no obstacle would prevent the attendance before it of persons whom it was proposed to present as witnesses or whom the Commission wished to hear. It also asked the Government for an assurance that all persons appearing before it as witnesses would enjoy full protection against any sanction or prejudice on account of their attendance or evidence before the Commission.

32. The Commission authorised its chairman to deal on its behalf with any questions of procedure that might arise between sessions, with the possibility of consulting the other members whenever he might consider this necessary.

Communications received following the first session on questions of procedure

33. The Chairman of the Commission received a letter dated 31 January 1986 from Dr. Winfrid Haase, representative of the Government of the Federal Republic of Germany on the ILO Governing Body, reading as follows:

(Translation)

I wish to thank you for your letter of 27 November 1985, indicating the outcome of the first session of the Commission of Inquiry.

The Government of the Federal Republic of Germany takes the opportunity, at the beginning of the inquiry, to stress once more

that it fully supports the aims of the International Labour Organisation and recognises the Organisation's procedures for supervising the observance of ILO standards by member States. It will collaborate in ensuring that also the present proceedings are carried out in accordance with the Constitution of the International Labour Organisation.

The Government of the Federal Republic of Germany has taken note of the contents of the above-mentioned letter of 27 November 1985 with great interest. Certain basic questions have arisen in this connection, the decisions on which will in the opinion of the Federal Government have considerable significance for the further stages of the procedure.

I.

When the Governing Body decided on 3 June 1985 to refer the matter to a Commission of Inquiry, it had before it the representation of the World Federation of Trade Unions and the report of the Committee which had examined the representation. The Government of the Federal Republic of Germany considers that this also determines the subject of the present inquiry. The Federal Government considers it problematical continuously to widen the inquiry into ever new cases which have been submitted not by the entity which previously made the representation, but by individuals or organisations not entitled to file a complaint.

An additional factor is that once again - as already in the representations procedure - several of the newly communicated cases have not yet been the subject of a final judgment and in none of the cases is there a definitive decision by the Federal Constitutional Court. The representative of the Government of the Federal Republic of Germany in the Governing Body already drew attention to this fact on 3 June 1985 in regard to the then relevant cases. He then raised the question, whether and how far one could judge the practice of a State in applying a Convention so long as the cases referred to had not been decided by the highest national courts.

II.

In your letter you requested the Government of the Federal Republic of Germany to communicate by 31 January 1986 the names and descriptions of witnesses whom it would wish the Commission to hear at its second session. Elsewhere in the letter reference is made in general terms to the questions which are the subject of the inquiry. For the closer identification of these questions, it is also stated that authoritative information is being sought on the situation both at the federal level and at the level of the Länder. In the rules for the hearing of witnesses which have been transmitted it is stated that statements and evidence may be presented to the Commission only for the purpose of providing factual information bearing on the questions at issue.

The Federal Government is concerned that it may not be able to respond adequately to the request made in your letter so long as details are not available of the specific subjects on which questions are to be put. When the Governing Body considered the preceding representation on 3 June 1985, all speakers pointed out that the matter under examination was extremely complex and would require thorough study. It was precisely the recognition of this fact which led the Governing Body to the decision not to consider the report of the committee which examined the representation as sufficient and to refer the matter to a Commission of Inquiry. The Federal Government concurred in this decision and constantly stressed its readiness for dialogue.

For a fruitful dialogue, it would consequently be of interest to know what questions concerning the case the Commission wishes to deal with. It would also be important to know whether the Commission would wish rather to look into individual cases or to consider general practice. The answer to these questions will determine whether the witnesses should be chosen to speak about individual cases or practice in regard to appointments or as expert witnesses on the legal position.

The Government of the Federal Republic of Germany considers that the session to be held for the hearing of witnesses should be devoted primarily to questions of law rather than to questions of fact. In so far as questions of fact are concerned, the Federal Government refers above all to the facts found by the independent courts, which have not been questioned by any of those concerned. The laws, ordinances and guide-lines as well as the decisions of the highest German courts are also known. Legal practice, in so far as reflected in these judicial decisions, is not contested by the Federal Government.

In the opinion of the Federal Government, the questions of law to be examined concern the following areas:

- 1.** Applicability of Convention No. 111 to the public service, particularly to relations of officials subject to a special obligation of faithfulness. At the sitting of the Governing Body on 3 June 1985, in addition to the Federal Government, also speakers on behalf of the Worker and Employer groups indicated that this was one of the basic questions concerning Convention No. 111.
- 2.** Applicability of Convention No. 111 in terms of the scope of protection (German measures not discrimination on the ground of political opinion).
- 3.** Interpretation of Article 1, paragraph 2, of Convention No. 111; if officials are covered by the Convention, account ought to be taken of the special relationship of faithfulness at least in the interpretation of this exception clause.
- 4.** Interpretation of Article 4 of Convention No. 111.

III.

A further question of the Government of the Federal Republic of Germany concerns the role which is to be played in the present inquiry proceedings by the entity which initiated the preceding representations procedure. We have the impression that in the present inquiry the initiator of the preceding representation is to enjoy rights and functions corresponding to those of a complainant (appearance of a representative at the hearings, right to present witnesses, etc.).

According to article 26 of the ILO Constitution, a procedure of complaint may be initiated:

- by a member State of the ILO (article 26, paragraph 1);
- by the Governing Body of its own motion (article 26, paragraph 4);
- on the basis of a complaint by a delegate to the Conference (article 26, paragraph 4).

In the present case the procedure has been initiated by the Governing Body of its own motion.

The Federal Government has no objection to the fact that factual indications for judging the questions at issue may be provided from all competent quarters. This certainly includes also information provided by workers' organisations which play a role at the level of the ILO.

There is however no provision under which an occupational organisation of workers, whose rights in supervisory procedures are expressly defined only in cases of representations under article 24 of the Constitution, is entitled to make a complaint and consequently to play a role similar to that of a complainant. Also in the present case the Governing Body correctly decided that the Commission should determine its procedure "in accordance with the provisions of the Constitution". The Government of the Federal Republic of Germany considers that it is not compatible with the Constitution of the ILO to permit an occupational organisation to act as if it were a complainant, in addition to the functions which the Governing Body has to exercise of its own initiative.

IV.

The Federal Government has already pointed out that in its view it would have been preferable to know what specific questions the Commission wishes to consider. Provisionally and subject to the reservations already expressed, several persons are mentioned below who can give comprehensive information on law and administrative practice regarding the duty of faithfulness to the Constitution in the public service of the Federal Republic of Germany:

(1) Federal Disciplinary Prosecutor Hans Rudolf Claussen, Oberlindau 76-78, 6000 Frankfurt/Main 1.

(2) Ministerialdirektor (Permanent Secretary) Wilhelm Freundlieb, c/o Federal Ministry of Posts and Telecommunications, Adenauerallee 81, Postfach 80001, 5300 Bonn 1.

(3) Ministerialdirigent (Assistant Secretary) Dr. Peter Frisch, c/o Ministry of Interior of Lower Saxony, Lavesallee 6, 3000 Hannover.

(4) Ministerialdirigent (Assistant Secretary) Dr. Matthias Metz, c/o Bavarian State Ministry of Finance, Odeonsplatz 4, 8000 Munich 22.

The Government of the Federal Republic of Germany is in contact with an additional expert witness from the educational administration and will shortly provide particulars concerning him. I would in addition like to reserve the right to designate further expert witnesses once the questions concerning the determination of the subject of the inquiry have been decided.

The Federal Government has already repeatedly expressed its views on the legal issues involved. It wishes expressly to recall those views, but reserves the possibility - in accordance with the invitation in your letter of 27 November 1985 - to submit further views by 15 March 1986.

At the same time, I wish to inform you that I have been instructed to appear before the Commission as representative on behalf of the Government of the Federal Republic of Germany. I assume that advisers to the Government's representative may also attend the sittings of the Commission and speak on particular questions. I will communicate the names of these advisers in due course.

34. By letter of 28 February 1986, the Chairman addressed the following reply to Dr. Haase:

I wish to thank you for your letter of 31 January 1986, in which you informed me that you had been designated to act as representative of your Government at the hearings of witnesses during the second session of the Commission of Inquiry established to examine the observance by the Federal Republic of Germany of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and referred to a number of questions arising out of my letter of 27 November 1985.

I confirm that, at the proposed hearings, you may be accompanied by advisers, and shall be glad to be informed of their names in due course.

I have carefully considered the questions raised in your letter, and have also consulted the other members of the Commission in this connection.

As regards the scope of the inquiry with which the Commission is charged, I confirm that the matter referred to the Commission by the Governing Body of the International Labour Office concerns the issues raised in the representation made by the World Federation of Trade Unions. The Commission is accordingly called upon to examine whether, contrary to the provisions of Convention No. 111, there exist in the Federal Republic of Germany discriminatory practices on the basis of political opinion against public servants and persons seeking employment in the public service, by virtue of the provisions concerning the duty of faithfulness to the Constitution. The Commission would not be prepared to consider any allegations or information going beyond those issues. Indeed, for this reason, the Commission decided at its first session not to take account of several communications addressed to the International Labour Office which referred to the situation of persons employed in the private sector.

The question of the scope of the inquiry needs to be distinguished from the nature of the information to be gathered and examined in the course of the inquiry. The Commission's mission is not to review the findings and conclusions of the Governing Body committee which examined the representation of the WFTU, but to undertake its own inquiry into the above-mentioned allegations. Consequently, the Commission's work is not limited to examining only the documentation submitted during the earlier examination by the Governing Body committee. It must inform itself fully on law and practice in the Federal Republic of Germany in regard to the matters at issue. In this respect, the Commission has followed the practice of earlier ILO Commissions of Inquiry, as recalled in the report of the Commission which dealt with the case concerning Poland (ILO Official Bulletin, Vol. LXVII, 1984, Series B, Special Supplement, paragraphs 53 and 476). It was for these reasons that the Commission decided at its first session to seek information from various Governments and employers' and workers' organisations, to take into consideration communications received from a number of individuals and organisations in the Federal Republic of Germany, in so far as relevant to the issues before it, and to proceed to the hearing of witnesses.

In your letter you also refer to the fact, on which you had already commented at the sitting of the Governing Body in June 1985, that a number of cases referred to in the documentation and communications before the Commission have not yet been the subject of a final judgement and that in none of these cases there is a definitive decision by the Federal Constitutional Court. The Commission will take these observations into account when it deliberates on its findings at the conclusion of the procedure, in order to decide what weight can be given to the information and documents submitted to it, and will bear in mind whether or not cases have been the subject of a final judgement. There would, however, be no justification for the Commission to exclude the material in question from consideration. The Commission is not called upon to pronounce upon individual decisions of the administrative and judicial authorities in the Federal Republic of Germany. Its task is to examine whether legislation and administrative practice are compatible with the obligations assumed by the Government of the Federal Republic under Convention No. 111. Information concerning individual cases constitutes evidence of administrative practice and of the practical effect of legal provisions, and as such is admissible.

Your letter also seeks clarification as to the nature of the questions to be dealt with at the forthcoming hearings of witnesses.

As may be seen from rule 5 of the rules enclosed with my letter of 27 November 1985, the main purpose of the hearings is to enable the Commission to inform itself fully of facts relevant to the inquiry. It would hope that the witnesses will provide information serving in particular to clarify the effect of the relevant legal provisions and the manner in which those provisions are applied in practice. While the evidence may cover both law and practice, it should relate to the situation in the Federal Republic of Germany (as indicated previously, both at the federal level and at the level of the Länder). It appears that the persons mentioned in your letter as provisionally selected to appear as witnesses would be eminently qualified to provide relevant evidence on the issues before the Commission.

While the main purpose of the hearings is as indicated above, the Government is entitled to make submissions on questions concerning the scope and interpretation of Convention No. 111. As you mention in your letter, the Government has already on a number of occasions, especially in connection with the examination of the representation of the WFTU, expressed its views on these aspects. It would be helpful to the Commission, and might save time at the hearings, if any further submissions on questions relating to the interpretation of the Convention could be addressed to the Commission in writing.

It has not been the practice of previous ILO Commissions of Inquiry to communicate in advance of hearings the questions which they wished witnesses to answer, and also in the present case the Commission does not propose to do so. The questions which the Commission may wish to put to the witnesses presented by your Government will depend partly on any further information which your Government may submit in answer to my letter of 27 November 1985, on the initial statements which the witnesses themselves may have made and on evidence given by preceding witnesses, including those presented by the WFTU. The Commission therefore does not propose to communicate in advance the specific questions which it may consider appropriate to put to particular witnesses. However, in order to assist your Government and its witnesses in preparing for the hearings, it intends to draw up an indicative list of issues which it would appear desirable for the Government's witnesses to cover in their evidence. The list will be sent to you as soon as practicable.

I have noted the questions relating to the personal scope and the scope of protection of Convention No. 111 enumerated in your letter. The Commission has already taken note of the earlier statements made by the Government on these matters, particularly in its reply to the representation of the WFTU and in your statement before the Governing Body in June 1985. As already indicated, it will be pleased to consider any further submissions which your Government may wish to communicate. The views expressed will be fully examined by the Commission when it deliberates on its conclusions.

It appeared from the Government's reply to the representation of the WFTU that it based its position on the argument that the existing law and practice in the Federal Republic of Germany were in conformity with Convention No. 111 because the measures taken to enforce the duty of faithfulness to the free, democratic basic order owed by public servants were wholly consistent with the provisions of Article 1, paragraph 2, and Article 4 of the Convention.

In your statement in the Governing Body on 3 June 1985, you also presented observations concerning the scope of the protection afforded by the Convention in respect of the expression of political opinions. In your letter of 31 January 1986, you refer to an additional issue, namely the question of the applicability of Convention No. 111 to the public service. The Commission would appreciate receiving your Government's written observations on the last-mentioned question.

I have taken note of your Government's comments concerning the role of the WFTU under the rules for the hearing of witnesses. It appears desirable, in the first instance, to draw a distinction between the conditions in which the Governing Body may decide to refer a matter to a Commission of Inquiry and the procedure to be followed by such a Commission once it has been established. The former question is governed by express provisions. The latter is not, and it has therefore been the constant practice, followed also in the present case, to leave it to the Commission to determine its procedure.

You will recall that the decision to refer the present case to a Commission of Inquiry was taken by the Governing Body in application of article 10 of the Standing Orders concerning the procedure for the examination of representations, by virtue of which, when a representation within the meaning of article 24 of the Constitution is communicated to the Governing Body, the latter may at any time, in accordance with paragraph 4 of article 26 of the Constitution, adopt the procedure provided for in article 26 and the following articles (that is, refer the matter to a Commission of Inquiry). The possibility that the Governing Body might consider it appropriate to establish a Commission of Inquiry to examine matters raised in a representation was envisaged when the original ILO Constitution was drawn up in 1919, and was advanced in favour of including in article 26 the power for the Governing Body itself to initiate proceedings before a Commission of Inquiry (see ILO Official Bulletin, Vol. I, 1919-1920, pp. 62-64).

The Commission's main concern, in drawing up the rules for the hearing of witnesses, was to establish arrangements which would enable it to obtain full and clear information on the matter referred to it.

As I have already mentioned, and as you yourself emphasise in your letter, the Commission's mandate is determined by the issues raised in the WFTU representation. The Commission must examine, by means of its own investigation, whether the allegations made in the representation are founded. As the initiator of these allegations, the WFTU has a duty to substantiate them. That explains why the Commission invited the WFTU to supply further information and also to present witnesses at the proposed hearings. The presence of a representative of the WFTU at those hearings is desirable, so that, as stated in rule 2 of the rules for the hearings, he may "be responsible for the general presentation of their witnesses and evidence". These arrangements are of a practical nature, to permit the hearings to be carried through in an effective manner and to enable the Commission to obtain, in so far as possible, clarification of any conflicting evidence adduced before it. They are in line with the practice followed by earlier Commissions of Inquiry, including the Commission established to examine the observance of certain Conventions by Chile, which was set up by the Governing Body of its own motion in the absence of a representation and of any specific initiator of the allegations examined (see Report of that Commission, 1975, paragraphs 17, 18, 27, 29, 31 and 32).

I wish to point out that, although rule 9 of the rules for the hearing of witnesses provides for the possibility for the representative of the WFTU to put questions to witnesses, according to rule 10 all questioning of witnesses will be subject to control by the Commission. The Commission will carefully consider any such questions to ensure that they remain strictly within the scope of the inquiry and are relevant to the clarification of the issues. It may of course itself seek additional explanations from witnesses on points on which clarification appears to it to be desirable.

I hope that the foregoing explanations will help to dispel the doubts or reservations to which you drew my attention in your letter. The Commission remains open to any further observations which your Government may wish to communicate. It would also be glad to receive you, in private, prior to the opening of the hearings to provide any further clarification which you might desire to have.

I note that your Government has not yet indicated the names of witnesses on behalf of the German Confederation of Trade Unions and other organisations of persons employed in the public sector. I assume that particulars concerning these witnesses will be communicated in due course.

I should also be glad to hear from you regarding the assurances requested from your Government in the last paragraph of my letter of 27 November 1985.

35. Further to the above-mentioned letter of 28 February 1986, an indicative list of issues to be covered by the Government's witnesses in their evidence was approved by the Commission and communicated to the Government by letter of 14 March 1986. The Commission emphasised that the list was of an indicative and non-exhaustive nature and that it was not intended to limit in any way the freedom of the Commission at the forthcoming hearings to ask witnesses whatever questions it might consider

appropriate.

36. By letter dated 17 January 1986, the General Secretary of the World Federation of Trade Unions informed the Commission that, in accordance with the rules for the hearing of witnesses, it had designated as its representative, to act on its behalf before the Commission, Mr. Pierre Kaldor, independent lawyer, of Asnières, France. It also communicated the names and brief particulars of 12 witnesses proposed by the WFTU to appear before the Commission at its second session.

37. By a letter of 5 February 1986 addressed to the WFTU on behalf of the Commission, it was noted that the WFTU proposed to present a total of 12 witnesses. Having regard to the relatively full documentation already available to the Commission on the cases of a number of these persons and in view of the limited time available for the hearings to be held on the occasion of the Commission's second session, the request was made that the number of witnesses be somewhat reduced. This would be on the understanding that, in respect of any of the witnesses originally proposed who would not be called to give evidence, the WFTU would be given the opportunity to submit written particulars of their circumstances and relevant documentation or to supplement such information as might already be in the Commission's possession. Such additional material was to be communicated to the Commission by 15 March 1986.

38. By letter of 21 February 1986, the WFTU informed the Commission that, having considered the above-mentioned request, it proposed to present six witnesses at the Commission's second session, whose names it indicated. In several subsequent communications, the WFTU and Mr. Kaldor communicated the names of persons who would attend as advisers to Mr. Kaldor.

39. By a communication of 27 March 1986, the Government of the Federal Republic of Germany supplied the full list of the representatives designated to appear on its behalf at the Commission's second session, as well as the names of witnesses due to appear on behalf of the Government and of witnesses designated to appear on behalf of certain trade unions of workers in the public sector.

40. By a letter of 11 April 1986, Dr. Haase communicated a statement worded as follows (translation): "On behalf of the Government of the Federal Republic of Germany, I give the assurance that all persons who appear before the Commission need fear neither sanctions nor prejudice, if their statements are truthful and do not violate penal provisions of the Federal Republic of Germany. Persons in the service of the Federation or of Länder will not suffer any prejudice on account of truthful evidence or statements given or made by them before the Commission in the framework of authorisations granted to give evidence."

Communications received following the first session on the substance of the case

41. With its previously mentioned letter of 17 January 1986, the WFTU communicated a publication by the "Arbeitsausschuss der Initiative 'Weg mit den Berufsverboten'", Hamburg, of June 1985, containing a review of recent judicial decisions by Martin Kutscha and the text of a judgment of the Administrative Court of Münster of 24 October 1984. The WFTU also referred to a Parliamentary debate which was to take place at the end of January 1986 and in which the Government of the Federal Republic of Germany was to express its views about "Berufsverbote", (Endnote 7) and to the discussions and findings of the Committee on the Application of Conventions and Recommendations of the International Labour Conference in 1981, 1982 and 1983.

42. By letter of 31 January 1986, the Government of the German Democratic Republic indicated that the treatment of the representation made by the WFTU was being followed with attention in the German Democratic Republic, and that it valued the efforts of the WFTU in seeking to defend the rights of working people everywhere in the world. It also emphasised its declared policy to ensure the basic rights of workers in law and practice, including the right to work, irrespective of nationality, race, philosophical or religious beliefs, social origin or status. By letter of 16 April 1986, the Government of Czechoslovakia stated that, in its view, all the essential aspects of the matter had been effectively dealt with in the report on the representation of the WFTU submitted to the Governing Body in February 1985. The conclusions in that report, that existing practices went beyond what was provided in Article 1, paragraph 2, and Article 4 of Convention No. 111, should be maintained. The Government also transmitted a statement by the Central Council of Trade Unions of Czechoslovakia.

43. The Governments of Austria, Belgium, Denmark, France, Netherlands and Switzerland, as well as the International

Organisation of Employers, informed the Commission that they had no particular information on the matters before the Commission.

44. The Commission received communications containing information and comments from the following organisations in the Federal Republic of Germany: Bundesvereinigung der Deutschen Arbeitgeberverbände (Confederation of German Employers' Associations), Deutscher Gewerkschaftsbund (German Confederation of Trade Unions), which stated that its comments were much in agreement with those of its member unions to which the Commission had also written, Gewerkschaft der Eisenbahner Deutschlands (German Railway Workers' Union), Gewerkschaft Erziehung und Wissenschaft (Educational and Scientific Workers' Union), Deutsche Postgewerkschaft (German Postal Workers' Union), Deutscher Beamtenbund (German Officials' Federation), and Deutscher Lehrerverband (German Teachers' Associations).

45. By letter of 30 January 1986, the International Confederation of Free Trade Unions informed the Commission that it was generally in agreement with the conclusions reached by the Committee set up by the Governing Body to examine the representation made under article 24 of the ILO Constitution, and stated that it had no information on the issues referred to the Commission other than that contained in the submission to be made by its affiliate, the Deutscher Gewerkschaftsbund, and its affiliated organisations.

46. The Commission received communications from a number of individuals and organisations in the Federal Republic of Germany, some of which provided information on recent developments in cases of exclusion or attempted exclusion from the public service already known to the Commission, while others gave information on further cases of this kind. The Commission decided to take these communications into consideration.

47. In accordance with the decision taken by the Commission at its first session, copies of all information and documentation received were transmitted to the Government of the Federal Republic of Germany and to the WFTU.

48. By letter of 27 March 1986, the Government of the Federal Republic of Germany communicated a statement of its position in regard to the alleged violation of Convention No. 111 and a legal opinion by Professor Karl Doehring, Professor of Public Law and International Law at the University of Heidelberg and Director at the Max-Planck Institute for Foreign Public Law and International Law.

Second session

49. The Commission held its second session in Geneva from 14 to 25 April 1986. During this session it devoted 15 sittings to hearing evidence and statements on behalf of the WFTU and the Government of the Federal Republic of Germany. (Endnote 8)

50. The rules for the hearings, which had been adopted at the first session of the Commission, were as follows:

(1) The Commission will hear all witnesses in private sittings. The information and evidence presented to the Commission therein is to be treated as fully confidential by all persons whom the Commission permits to be present.

(2) The Government of the Federal Republic of Germany and the World Federation of Trade Unions will each be requested to designate a representative to act on their behalf before the Commission. The representatives will be expected to be present throughout the hearing of witnesses and will be responsible for the general presentation of their witnesses and evidence.

(3) Witnesses may not be present except when giving evidence.

(4) The Commission reserves the right to consult the representatives in the course of or upon the completion of the hearings in respect of any matter on which it considers their special co-operation to be necessary.

(5) The opportunity to furnish evidence and to make statements is given only for the purpose of providing to the Commission factual information bearing on the case before it. The Commission will give witnesses all reasonable latitude to furnish such information, but it will not entertain any information or statements which are of a purely political character not relevant to the issues referred to it.

(6) The Commission will require each witness to make a solemn declaration identical to that provided for in the Rules of Court of the International Court of Justice. This declaration reads: "I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth".

(7) Each witness will be given an opportunity to make a statement before questions are put to him. If a witness reads a statement, the Commission would like to receive six copies.

(8) The Commission or any member of the Commission may put questions to witnesses at any stage.

(9) The representatives present in accordance with the rules laid down in paragraph 2 above will be permitted to put questions to the witnesses, in an order to be determined by the Commission.

(10) All questioning of witnesses will be subject to control by the Commission.

(11) Any failure on the part of a witness to reply satisfactorily to a question put will be noted by the Commission.

(12) The Commission reserves the right to recall witnesses, if necessary.

51. During the hearings, the Government of the Federal Republic of Germany was represented by the following persons: Dr. Winfrid Haase, representative of the Government of the Federal Republic on the ILO Governing Body and before the Commission; Mr. Alfred Breier, Chief of the Public Service Law Division in the Federal Ministry of the Interior; Dr. Rudolf Echterhölter; Mr. Ralf Krafft, Public Service Law Division of the Ministry of the Interior; Dr. Horst Weber, of the Federal Ministry of Labour and Social Affairs, Deputy Government representative on the ILO Governing Body; Dr. Reinhard-W. Hilger, of the Permanent Mission of the Federal Republic of Germany in Geneva; Mr. Diethelm Gerhold, of the Public Service Law Division of the Ministry of the Interior; and Mr. Ulrich Nitzschke, of the Ministry of External Affairs.

52. The WFTU was represented by Mr. Pierre Kaldor, assisted by Mr. Lucien Labrune, Permanent Representative of the WFTU in Geneva; Mr. Horst Heichel, Adviser of the WFTU; and Mr. Detlef Nehr Korn, Adviser of the "Initiative 'Weg mit den Berufsverboten'", Hamburg; and with the technical assistance on certain days of Professor Gerhard Stuby, of the University of Bremen, and the following advocates: Mr. Hans Schmitt-Lermann, Mr. Dieter Wohlfarth, Mr. Klaus Dammann, and Mr. Helmut Stein.

53. The Commission heard the following witnesses:

Witnesses presented by the WFTU: Professor Norman Paech, Professor of Public Law at the University for Economics and Politics, Hamburg; Mr. Hans Meister, former telecommunications technician in the Federal Postal Service; Mr. Gerhard Bitterwolf, former teacher; Mr. Herbert Bastian, clerk in the Federal Postal Service; Mrs. Charlotte Niess-Mache, Senior Councillor in the Ministry for Environmental Protection, North Rhine-Westphalia; Professor Wolfgang Däubler, Professor of Labour, Commercial and Economic Law at the University of Bremen.

Witnesses presented by the Government: Dr. Matthias Metz, Chief of the Personnel Department of the Ministry of Finance, Bavaria; Dr. Peter Frisch, Chief of the Office for the Protection of the Constitution, Ministry of the Interior, Lower Saxony; Mr. Hans Rudolf Claussen, Federal Disciplinary Prosecutor; Mr. Wilhelm Freundlieb, Chief of the Department for Personnel Matters, Federal Ministry of Posts and Telecommunications; Mr. Wolfgang Ziegler, Chief of the Legal Department of the Ministry of Education and Sport, Baden-Württemberg; Professor Karl Doehring.

Witnesses appearing on behalf of trade unions: Mr. Günter Ratz, Chief of the Department for Administrative, Civil and Penal Law, German Postal Workers' Union (DPG); Mr. Heinrich Ortmann, Legal Adviser in the Central Office of the Educational and Scientific Workers' Union (GEW); Mr. Gerhard Halberstadt, Member of the Federal Committee responsible for the public service, German Salaried Employees' Union (DAG); Mr. Alfred Krause, Federal Chairman of the German Officials' Federation (DBB).

54. At the beginning of the hearings, the Chairman made the following statement:

On behalf of the Commission, I wish to welcome the representatives of the Government of the Federal Republic of Germany and of the World Federation of Trade Unions. The Commission appreciates the arrangements made, in response to its invitation, for the representation of the Government and of the WFTU before it and for the presentation of witnesses. It trusts that the present hearings will make a substantial contribution to the Commission's efforts to inform itself fully on the situation in the Federal Republic of Germany with regard to the matters which have been referred to it for examination.

The Commission has taken careful note of the detailed comments presented by the Government of the Federal Republic of Germany concerning the interpretation of the provisions of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the relationship of national law and practice to these international standards. It appreciates the contribution which these comments can make to the understanding and evaluation of the situation, and will take them fully into account when it deliberates on the conclusions to be formulated on the matters before it.

Before proceeding to the hearing of the witnesses, the Commission considers it appropriate to recall the framework within which it is called upon to exercise its functions.

The allegations before the Commission were originally made in a representation submitted to the International Labour Office by the World Federation of Trade Unions in June 1984 under article 24 of the Constitution of the International Labour Organisation. The Governing Body of the International Labour Office appointed a tripartite committee to examine the representation. In June 1985 the Governing Body had before it the report of that committee. After hearing a statement by the representative of the Government of the Federal Republic of Germany, the Governing Body decided, in application of article 10 of the Standing Orders concerning the procedure for the examination of representations, to refer the matter to a Commission of Inquiry, in accordance with article 26, paragraph 4, of the Constitution.

The Commission wishes to emphasise that its task is not to review the work of the tripartite committee of the Governing Body that examined the original representation, but to undertake de novo a full examination of the issues raised in the representation. It is on that basis that the Commission took a series of decisions at its first session with a view to obtaining more complete information on the matters before it, including the decision to proceed to hearings of witnesses.

The Commission wishes to emphasise that the purpose of the present hearings is to enable it to obtain more complete information on the situation in the Federal Republic of Germany on the matters referred to it. These hearings are thus aimed at advancing the fact-finding aspect of the Commission's task. They should not be regarded as in the nature of adversary judicial proceedings.

The Governing Body, when it decided to establish the present Commission of Inquiry, resolved to refer to it the matter raised in the previously mentioned representation of the WFTU. It follows that the scope of the inquiry is determined by the allegations made in that representation. Those allegations were to the effect that, contrary to the provisions of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), there exist in the Federal Republic of Germany discriminatory practices on the basis of political opinion against public servants and persons seeking employment in the public service, by virtue of the provisions concerning the duty of faithfulness to the free democratic basic order. That is the matter which the Commission is called upon to examine, and to which the evidence and statements to be presented at the present hearings should be related.

Since the question before the Commission concerns the alleged existence of discrimination in employment on the basis of political opinion, various aspects of a political nature require consideration in the inquiry. However, as the Commission has stated in paragraph 5 of the rules for the hearings of witnesses, it will not entertain information or statements of a purely political character not relevant to the issues referred to it. The Commission trusts that it will be able to count on the support and collaboration of all those appearing before it in ensuring that the evidence and statements presented remain within the limits of the issues under examination.

The Commission deems it desirable to give some indication also on the extent to which it considers that information concerning the position in countries other than the Federal Republic of Germany may have relevance to its work. The Commission recognises the usefulness which a comparison of the laws and practices of other States may have in considering certain issues arising under international instruments. This may also be the case in the present proceedings, particularly when considering the

objective necessity of restrictions imposed in purported application of the limitation clauses contained in Convention No. 111. On the other hand, the Commission wishes to emphasise that it is not part of its functions to make any pronouncement upon, or even to examine, whether any State other than the Federal Republic of Germany is or is not observing the provisions of ILO Convention No. 111. Within the range of supervision procedures established by the International Labour Organisation, there are other bodies which have the mandate to examine the degree of compliance with ratified Conventions by all States concerned. In the present case, in accordance with the terms of article 26 of the Constitution under which it has been appointed, the Commission is competent to examine only whether the Federal Republic of Germany is ensuring the effective observance of Convention No. 111.

The Commission wishes to stress that its function is not to review individual decisions taken by national administrative or judicial authorities with a view to granting relief to the individuals concerned or pronouncing upon their rights. It should be borne in mind that, in contrast to certain other international instruments, the provisions of Convention No. 111 are not formulated in terms of individually guaranteed rights, but place upon States which have ratified it an obligation to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof. In this context, the examination of the facts of individual cases is relevant and justified in so far as it throws light on the question whether the legal provisions in force and the policies and practices followed by the public authorities in the Federal Republic of Germany are consistent with the obligations assumed under Convention No. 111.

On page 8 of the comments by the Government of the Federal Republic recently presented to the Commission, reference is made to communications stated to have been addressed to the ILO concerning two named cases. The Commission wishes to make clear that submissions concerning those cases have not been received with reference either to the original representation under article 24 of the Constitution or the present inquiry by the Commission. Copies of all communications which have been received with reference to the inquiry have been transmitted to the Government of the Federal Republic of Germany and to the WFTU.

I wish to draw special attention to paragraph 1 of the rules for the hearing of witnesses, according to which the information and evidence presented to the Commission during the hearings is to be treated as confidential by all persons whom the Commission permits to be present. The Commission counts upon the representatives to ensure that this condition will be observed.

The persons permitted to be present, apart from the members of the Commission and its secretariat, are the persons designated to represent the Government of the Federal Republic of Germany and the WFTU respectively. The Commission has recently received notification of certain modifications in the persons designated by the WFTU. A list of the persons concerned will be prepared and made available to all concerned shortly. As indicated in the rules adopted by the Commission, witnesses will be permitted to be present only when giving evidence.

In the letter which I addressed to the Government of the Federal Republic of Germany on 27 November 1985, I indicated that the Commission wished the Government to ensure that no obstacle would prevent the attendance before it of persons whom it was proposed to present as witnesses or whom the Commission would wish to hear. The Commission also requested an assurance from the Government that all persons appearing before it as witnesses would enjoy full protection against any sanction or prejudice on account of their attendance or evidence before the Commission. Today the Commission has received a letter from Dr. Haase in the following terms: (Text as set out in paragraph 40 above.)

55. Following the statement by the Chairman, Dr. Haase handed to the Commission a statement on behalf of the Government of the Federal Republic of Germany in the following terms:

(Translation)

I.

The Government of the Federal Republic of Germany is protesting against the fact that the World Federation of Trade Unions is being given a role similar to that of a complainant in these proceedings.

As can be seen from the rules for the hearing of witnesses transmitted to the Federal Government, particularly rules 2, 4 and 9, the World Federation of Trade Unions is to be accorded the same legal status in the proceedings as the Government of the Federal Republic of Germany. The Federal Republic and the World Federation of Trade Unions have each, on an equal footing, been requested to appoint a representative (rule 2). Also the representative of the World Federation of Trade Unions can be consulted before, after or during the hearing of all witnesses (rule 4); like the representative of the Federal Republic he can also put questions to all witnesses (rule 9).

Furthermore, in rule 2, reference is made to the witnesses on both sides as in adversary proceedings. In an inquiry initiated *ex officio*, there can be only witnesses of the Commission. But that is not all. As the Federal Government learnt to its great surprise from the letter of the International Labour Office of 2 April 1986, the World Federation of Trade Unions is even to be given the right to make a final statement, although this has not even been provided for in the rules of procedure and also cannot be justified by the need for clarification of factual matters, and although the Federal Government, in its communication of 31 January 1986, had already, on the basis of detailed explanations, raised strong objections to the participation in the proceedings previously contemplated for the World Federation of Trade Unions.

The World Federation of Trade Unions in all documents of the Commission is thus treated like a complainant; only the formal concept "complainant" has been replaced by the expression "World Federation of Trade Unions".

The Government of the Federal Republic of Germany has made it quite clear in its statements that a participation in this inquiry of the World Federation of Trade Unions, in particular in a role similar to that of a complainant, is contrary to the Constitution of the ILO. There is no relevant "established practice" from earlier Commissions of Inquiry, because this is the first procedure of its kind. Moreover, an unconstitutional practice could never be legally recognised. The Federal Republic also cannot recognise any practical needs for this procedure. The Commission of Inquiry in its communication of 28 February 1986 has itself pointed out that for its inquiry the statements and the explanations of the earlier representation procedure are not decisive. Therefore, also for reasons of usefulness, the participation of the initiator of the earlier representation cannot arise. Moreover, considerations of usefulness could in no case warrant departure from binding constitutional provisions.

II.

Accordingly, the Federal Government must request the Commission not to have the World Federation of Trade Unions participate in the proceedings as contemplated, since its attendance during the private hearings is not legitimate.

The Federal Republic must reserve all its rights in case this request is not met. It has always stressed that it is ready to co-operate closely and to enter into full dialogue in all procedures provided for in the ILO Constitution. Such participation, however, is obviously dependent on strict observance of the relevant rules of procedure in the Constitution. Such strict observance of the rules is also in the interests of the ILO, because otherwise the acceptability of the supervisory machinery would be seriously impaired.

The Federal Government's readiness so far to continue the proceedings has been based on its wish not to lend itself to the reproach that it is impeding the Commission in clarifying the facts. It still has this wish. The Federal Government must, however, make its further attitude dependent on account being taken of its basic objections. It can only accept such questions as are put by the Commission and legitimate participants in the procedure. Questions by the WFTU cannot be accepted. The Federal Government would understand it if individual witnesses, whom it always regards as witnesses of the Commission of Inquiry, would act accordingly. Should the Commission, however, in the light of suggestions by the World Federation of Trade Unions, consider any further clarification to be called for, the Federal Government would set aside its objections if the Commission took up these suggestions in the form of questions of its own.

In any case, a final statement by the World Federation of Trade Unions would not be acceptable.

III.

The Federal Government has gained the impression through this procedure that the far-reaching lack of detailed rules of procedures in the field of supervision of the application of standards leads to great uncertainties, questions and inconsistencies

which might throw discredit on this important instrument for the guarantee of human rights in the world of labour. In that respect also the Government of the Federal Republic of Germany must reserve its right to express its position at a later date.

56. After the Commission had deliberated on the foregoing objection, the Chairman made the following statement:

The Commission has taken note of the objection raised by the Government of the Federal Republic of Germany to the role of the representative of the World Federation of Trade Unions provided for in the rules for the hearing of witnesses adopted by the Commission. The Government claims that the provisions in question grant to the WFTU a status equivalent to that of a complainant and that such a situation is not in conformity with the ILO Constitution.

The Commission considers that this objection is not founded. The provisions of the ILO Constitution must be read as a whole. An organisation such as the WFTU has the right to make a representation under article 24 of the Constitution, and the Governing Body, when seized of such a representation, is entitled, under article 26, paragraph 4, to refer the matters raised in the representation to a Commission of Inquiry. The preparatory work of the ILO Constitution shows that one of the reasons for inserting in article 26 a provision authorising the Governing Body to establish a Commission of Inquiry of its own motion was that it was considered desirable that such a possibility should exist where a representation had been received under article 24 - see ILO Official Bulletin, Vol. I, 1919-20, pp. 62 to 64. This possibility is moreover specifically referred to in article 10 of the Standing Orders concerning the procedure for the examination of representations. There can thus be no doubt that the reference to a Commission of Inquiry of the matter raised in the WFTU representation, in accordance with article 26, paragraph 4, of the Constitution represents a valid exercise of the powers bestowed upon the Governing Body by that provision.

The International Labour Organisation has established no general rules of procedure for Commissions of Inquiry. It has been the constant practice of the Governing Body to leave it to such Commissions to decide their own procedure. Also in the present case the Governing Body decided, "in conformity with established practice, that the Commission should determine its own procedure, in accordance with the provisions of the Constitution".

In establishing the rules for the hearing of witnesses, the Commission has followed closely the practice of earlier Commissions. It has been the constant practice of such Commissions to provide for the representation, at any hearings of witnesses, of the initiator of the allegations under examination, with rights corresponding to those provided for in the rules adopted in the present case. In particular, when Commissions of Inquiry have been established in application of article 26, paragraph 4, of the Constitution following the receipt of a complaint by a delegate to the International Labour Conference, the initiators of the complaint have always been accorded rights of representation of this nature. The Commission can see no reason why, as regards the representation at hearings of witnesses of the initiator of the allegations under examination by a Commission of Inquiry, any distinction should be made between cases in which, acting under article 26, paragraph 4, of the Constitution, the Governing Body has referred to a Commission allegations of non-observance of a ratified Convention made by a Conference delegate under that paragraph, and cases where, acting under the same provision, the Governing Body has referred to a Commission similar allegations submitted by an occupational organisation under article 24 of the Constitution. In both cases the mandate of the Commission is to examine whether the allegations concerned are founded, and the hearings of witnesses decided upon by the Commission represent one of the measures taken to inform itself fully on the matters at issue. The Commission recalls that in the case concerning Chile, in which the Commission of Inquiry had been established by the Governing Body of its own motion in response to a resolution adopted by the International Labour Conference, corresponding rights of representation at the hearing of witnesses were accorded to three international trade union organisations having consultative status with the ILO, even in the absence of a representation and of any specific initiator of the allegations examined.

The Commission concludes that, in providing for the representation of the WFTU in the manner set out in the rules for the hearing of witnesses, it has acted in accordance with the authority given to it by the Governing Body and consistently with the ILO Constitution.

This situation reflects the tripartite principle which characterises the structure and therefore also the procedures of the International Labour Organisation.

The Commission wishes to recall that, although rule 9 of the rules for the hearing of witnesses provides for the possibility for

the representatives to put questions to witnesses, according to rule 10 all questioning of witnesses will be subject to control by the Commission. The Commission will carefully consider any questions put to ensure that they remain strictly within the scope of the inquiry and are relevant to the clarification of the issues.

The Commission proposes to confine the present hearings to the taking of evidence from the witnesses.

The Commission feels confident that, if all concerned will bear in mind the importance of remaining within the Commission's mandate, the present hearings can take place in a constructive spirit which will enable it to obtain a proper understanding of the important questions brought before it and facilitate the task of the Commission in carrying out impartially and objectively the mandate entrusted to it by the Governing Body.

57. The Government's representative requested the Commission to take cognisance of the communications addressed to the ILO by lawyers acting for Dr. Kosiek and for members of the National Democratic Party of Germany (NPD), to which reference had been made in the written comments submitted by the Government and also in the opening statement by the Chairman of the Commission. After the Commission had considered this request, the Chairman made the following statement:

At the first sitting, the representative of the Government of the Federal Republic of Germany requested the Commission to take cognisance of the communications received by the International Labour Office respecting the two cases mentioned on page 8 of the Government's comments.

The Commission recalls that, in deciding whether to take into consideration the numerous communications which have been addressed to it by individuals and organisations in the Federal Republic of Germany, it has based itself on the test of whether the information provided was relevant to the issues before it. As I indicated at the opening of the present hearings, the matter which the Commission is called upon to examine is whether, contrary to Convention No. 111, there exist in the Federal Republic of Germany discriminatory practices on the basis of political opinion against public servants and persons seeking employment in the public service, by virtue of the provisions concerning the duty of faithfulness to the free democratic basic order. In considering the request by the Government of the Federal Republic of Germany, the test to be applied is whether the information in question is relevant to that issue.

The Commission has seen the letters received by the ILO relating to the two cases mentioned by the Government. As far as concerns the case of Dr. Kosiek, the Office received a letter from his lawyer, Dr. Wingerter, dated 17 September 1985. That letter requested a copy of the report of the Governing Body committee which had examined the representation of the WFTU, but did not provide any information on the substance of his client's case.

The Commission has, however, obtained the public documents of the Council of Europe in the two cases which are at present pending before the European Court of Human Rights concerning exclusion from the public service in the Federal Republic of Germany. Since they are public documents, the Commission will take them into account, in so far as the information contained in them is relevant to the issues before it.

The ILO has also received two letters from Dr. Huber, a lawyer who has represented a number of persons in proceedings in the Federal Republic of Germany, dated 27 July 1984 and 29 August 1984. They gave information on various cases concerning exclusion from the public service, but without reference to the proceedings under article 24 of the ILO Constitution which had been initiated shortly before. No subsequent communication has been received requesting that the information in question be taken into consideration in the present proceedings. However, the information contained in the two letters is relevant to the issues before the Commission. The Commission has therefore decided to take cognisance of the letters in question. Copies thereof will be provided to the Government and to the WFTU.

58. At the conclusion of the hearings, the Chairman made the following statement:

The Commission has now come to the end of the hearing of witnesses. It once more wishes to thank both the Government of the Federal Republic of Germany and the World Federation of Trade Unions for the arrangements made by them to enable the Commission to receive this evidence. It also expresses its appreciation to the representatives who have participated in these hearings for their collaboration.

The evidence given has covered a wide range of questions, both of fact and of law in the Federal Republic of Germany. Should the Government or the WFTU consider it desirable to provide further explanations or comments on any of these matters, the Commission would be glad to receive those explanations or comments in writing by 30 June 1986.

The Commission would also wish to be kept informed of any new developments relevant to its work, particularly any further judicial decisions either in cases which have already been brought to its attention or which bear on questions of law relevant to its inquiry.

The Commission considers that it would be appropriate, as a further stage in its inquiry, to undertake a visit to the Federal Republic of Germany, in particular in order to inform itself more fully of the policies and practice of the authorities in various parts of the country in applying the provisions relating to the duty of faithfulness to the free democratic basic order of persons in the public service and of the effects of such policies and practice.

The Commission wishes to carry out such a visit from 4 to 13 August 1986. The Commission's secretariat will communicate to the Government the programme which the Commission would wish to follow.

The Commission would appreciate it if the Government of the Federal Republic of Germany would confirm its willingness to receive the Commission and to provide the necessary facilities to enable it to carry out its mission. The Commission wishes in particular to receive an assurance that it will enjoy complete freedom of movement and be free to meet and speak with anyone whom it may wish to see.

59. Both the Government of the Federal Republic and the WFTU availed themselves of the opportunity to present further comments. The Government communicated a statement by letter of 30 June 1986. The WFTU communicated a statement by letter of 24 June 1986. By letter of 27 June 1986, the Working Group of the "Initiative 'Weg mit den Berufsverboten'", Hamburg, at the request of the WFTU, communicated a series of documents containing statements by various authorities, non-governmental organisations and trade union bodies, as well as documents relating to a number of individual cases. The Commission received a letter dated 9 June 1986 from the legal representative of the Deutsche Kommunistische Partei (DKP), submitting comments on behalf of the Chairman of this party. Communications continued to be received from various organisations and individuals in the Federal Republic of Germany. Copies of these communications were transmitted to the Government of the Federal Republic of Germany and to the WFTU.

The Commission's visit to the Federal Republic of Germany

60. By letter of 19 June 1986, the Government indicated its willingness to receive the Commission and to make the necessary arrangements to enable it to carry out its mission, and stated that the Commission would be able to carry out its proposed programme without any hindrance. In acknowledging the receipt of this communication, the Commission confirmed, in response to a request by the Government, that it intended to maintain the confidentiality of the procedure during the visit, and that it would bring to the Government's attention any relevant new factual or other elements which might be communicated to it in the course of the visit, with a view to giving the Government an opportunity to present comments thereon.

61. The Commission, accompanied by its secretariat, stayed in the Federal Republic of Germany from 4 to 13 August 1986. On 5 August, it was received by Mr. Manfred Baden, Secretary of State at the Federal Ministry of Labour and Social Affairs, in Bonn, and then had discussions with representatives of competent federal ministries. On 6 August, the Commission had discussions with representatives of the authorities of North Rhine-Westphalia, in Düsseldorf, and with Professor Christian Tomuschat, Director of the Institute of International Law at the University of Bonn, member of the United Nations International Law Commission. On 7 August, the Commission had discussions with representatives of the authorities of Hessen, in Wiesbaden. On 8 August, the Commission had discussions, in Mainz, with representatives of the authorities of Rhineland-Palatinate and with representatives of the Rhineland-Palatinate sections of the Deutscher Gewerkschaftsbund (DGB) and of the Gewerkschaft Erziehung und Wissenschaft (GEW). On 9 August, Professor Parra-Aranguren met Mr. Willi Rothley, lawyer and member of the European Parliament.

62. On 11 August, the three members followed separate programmes. The Chairman had discussions, in Stuttgart, with

representatives of the authorities of Baden-Württemberg, with Mr. Dieter Wohlfarth and Mr. Hans Schmitt-Lermann, lawyers practising respectively in Stuttgart and in Munich, and with representatives of the Baden-Württemberg section of the GEW. Professor Schindler had discussions, in Hannover, with representatives of the authorities of Lower Saxony, with Mr. Heinz Reichwaldt and Mr. Detlef Fricke, lawyers, and with representatives of the Lower Saxony section of the GEW. Professor Parra-Aranguren had discussions, in Saarbrücken, with representatives of the authorities of Saarland.

63. On 12 August, in Wiesbaden, the Commission had discussions with Professor Erhard Denninger, Professor of Law at the University of Frankfurt-on-Main. The members of the Commission also undertook a preliminary review of the conclusions to be drawn from the information at their disposal.

64. In the course of the visit, the Commission received a number of additional documents, both from authorities and during non-official contacts. Copies of relevant documents were communicated to the Government of the Federal Republic.

65. By letter of 18 November 1986, the Government communicated its final comments.

Third session

66. The Commission held its third session in Geneva from 18 to 26 November 1986. The session was devoted to deliberation on the substance of the case and the preparation of the Commission's report.

CHAPTER 3

THE REQUIREMENTS OF THE DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION, 1958 (NO. 111) IN RELATION TO PROTECTION AGAINST DISCRIMINATION ON THE BASIS OF POLITICAL OPINION

67. Recognition of the fundamental principle of the equality of rights of all human beings has been basic to the activities of the International Labour Organisation since its creation and has inspired many of the decisions of the International Labour Conference. In the Declaration of Philadelphia, by which the Conference redefined the aims and objectives of the Organisation in 1944, it affirmed that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity".

68. Following the adoption of the Universal Declaration of Human Rights in 1948, the United Nations and more specifically the Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities likewise undertook a programme designed to lead to fuller implementation of the Declaration. On the proposal of the Sub-Commission, confirmed by the Commission on Human Rights, the Economic and Social Council adopted a resolution in 1954 which invited the International Labour Organisation to undertake a study of discrimination in the field of employment and occupation. After considering this study, the Governing Body decided in 1955 to place the subject on the agenda of the 40th (1957) Session of the International Labour Conference. The Governing Body expressed the view that the documents to be submitted to the Conference should deal with discrimination on all the grounds listed in article 2(1) of the Universal Declaration of Human Rights, according to which "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". (Endnote 9)

69. The report submitted for the first discussion at the Conference, in analysing the measures taken by governments, noted:

The commonest form which direct government action against discrimination in employment takes is the inclusion in laws or regulations governing admission to public employment of provisions barring distinctions on one or more of the following grounds: religion, race, sex, political opinion, national origin. Special measures may also be taken to ensure that these regulations are observed by government departments.

The report indicated that a further step adopted by some countries consisted of measures to ensure that the principle of non-discrimination was followed in all employment resulting from the expenditure of public money. (Endnote 10)

70. In its conclusions, the report indicated that one of the immediate steps which the national authorities might take to promote acceptance and observance of a policy aimed at eliminating any existing discrimination "is to ensure that the policy is strictly applied in all the spheres of employment and training coming under their direct control, that is primarily in the civil service and in state training establishments; another is to modify any discriminatory legislation which may exist". (Endnote 11)

71. The Discrimination (Employment and Occupation) Convention, adopted in 1958, has so far been ratified by 107 States and is thus among the most widely ratified ILO Conventions.

72. It is proposed to examine below the effect of the provisions of Convention No. 111, in relation to protection against discrimination on the basis of political opinion, in the light of certain indications contained in the preparatory work leading to the adoption of the Convention and views expressed by ILO supervisory bodies.

Article 1, paragraph 1, of the Convention (definition)

73. According to Article 1, paragraph 1, of the Convention:

The term "discrimination" includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

74. With reference to discrimination based on political opinion, the Committee of Experts on the Application of Conventions and Recommendations made the following remarks in a General Survey of 1963:

One of the essential traits of this type of discrimination is that it is most likely to be due to measures taken by the State or the public authorities. Its effects may be felt in the public services, but are not confined thereto; moreover in many modern economies the distinction between the public and the private sector has become blurred or has disappeared completely. Discrimination may be exercised against persons holding a particular viewpoint, or even any political opinion other than that of the authority or person imposing the measure. (Endnote 12)

75. In comments concerning the observance of the Convention by certain countries, the Committee of Experts has observed:

In protecting workers against discrimination on the basis of political opinion, the Convention implies that this protection shall be afforded to them also in respect of activities expressing or demonstrating opposition to the established political principles, since the protection of opinions which are neither expressed or demonstrated would be pointless.

The Committee has also observed:

The protection afforded by the Convention is not limited to differences of opinion within the framework of established principles. Therefore even if certain doctrines aim to bring about fundamental changes in the institutions of the State, this does not constitute a reason for considering their propagation beyond the protection of the Convention, in the absence of the use or advocacy of violent or unconstitutional methods to bring about that result. (Endnote 13)

Article 1, paragraph 2 (exceptions based on the inherent requirements of a particular job)

76. According to Article 1, paragraph 2:

Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

77. The conclusions initially proposed by the International Labour Office for the first discussion of the draft Convention at the Conference in 1957 did not contain provisions providing for exceptions to the general principle of non-discrimination. The Office had however noted that in their replies to the questionnaire set out in the first report on the question, the Governments of Austria, the Federal Republic of Germany, Israel, Switzerland and the United Kingdom had considered that it was not

sufficiently clear that distinctions determined by the inherent requirements of the job were not regarded as discrimination. (Endnote 14) During the first discussion in the competent Conference Committee in 1957, three similar amendments were submitted respectively by the United Kingdom Government member, by the Irish Government member and by the Government members of Austria, the Federal Republic of Germany, the Netherlands and Switzerland, with a view to specifying that distinctions determined by the inherent requirements of the job were not to be considered as discrimination. Their purpose was to cover cases where to match the needs of the job, an employer took into consideration factors such as national extraction, sex, etc. The Committee adopted the amendment submitted by the United Kingdom Government member. (Endnote 15)

78. Following the first discussion, the Office proposed for the second discussion at the Conference in 1958 a draft which provided that "distinctions in respect of access to a particular employment based on the inherent requirements thereof shall not be deemed to be discrimination". (Endnote 16)

79. In its comments on this text, the Government of the Federal Republic of Germany thought that it might be desirable to use the terms "employment and occupation" and the Government of the United Kingdom proposed a different text, referring to distinctions in respect of employment or occupation. (Endnote 17) Concerning these comments, the Office underlined that the terms "employment or occupation" would seem to cover a much wider field than the word "job" used in the text adopted in 1957. (Endnote 18)

80. During the discussion in the competent Conference Committee in 1958, the United Kingdom Government member proposed that the text should refer to distinctions in respect of "a particular job" instead of "access to a particular employment", the intention being to restore the text adopted by the Committee in 1957. This amendment was adopted. (Endnote 19)

81. It may, furthermore, be noted that during the preparatory work of the Convention the Government of the Federal Republic, in its written reply to the preliminary report and ILO questionnaire, gave the following indications regarding the definition and scope of the instrument to be adopted: "It is not ... possible to apply the term "discrimination" within the meaning of the proposed instrument to cases where individual employees are debarred from certain posts because they do not possess the personal or technical qualifications required for the job (for example insufficient knowledge of the language in the case of a foreign underground miner) ... Political or other opinions should not be taken as a reason for denying equality of treatment. This principle, as laid down in the Constitution and in particular in its article 3, ... has been put into effect throughout the territory." The Government expressed the view, however, that "the exclusion of persons holding divergent political views from certain positions in the so-called Tendenzbetriebe should not be regarded as political discrimination". (Endnote 20)

82. In its General Survey of 1963, the Committee of Experts on the Application of Conventions and Recommendations indicated in relation to Article 1, paragraph 2, of the Convention that it was

aware that political opinions may be taken into account in connection with the requirements of certain senior administrative posts involving special responsibility in the implementation of government policy; if carried beyond certain limits, however, this practice comes into conflict with the provisions of the 1958 instruments which call for the pursuance of a policy designed to eliminate discrimination on the basis of, inter alia, political opinion, particularly in employment under the direct control of a national authority. (Endnote 21)

The Committee also observed that:

If it may be admissible, in the case of certain higher posts which are directly concerned with implementing government policy, for the responsible authorities generally to bear in mind the political opinions of those concerned, the same is not true when conditions of a political nature are laid down for all kinds of public employment in general ... (Endnote 22)

Article 1, paragraph 3 (scope of the expression "employment and occupation")

83. According to Article 1, paragraph 3:

The terms "employment" and "occupation" include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

84. It should be noted, in the first place that, by virtue of this definition, the protection provided for by the Convention is not limited to the treatment of a person already in an employment or occupation but applies also to entry into employment or a profession as well as to access to vocational training.

85. In an appendix to the report prepared for the second discussion at the Conference, the Office sought to define more precisely the significance of the terms "employment" and "occupation". It referred in particular to the Seventh and Eighth International Conferences of Labour Statisticians. These conferences had considered that the word "occupation" was "the trade, profession or type of work performed by an individual irrespective of the branch of economic activity to which he is attached or of his industrial status". They had also concluded that "persons in employment" included all persons above a specified age who were "at work" and that the phrase "at work" included not only persons whose status was that of employee but also those whose status was that of "worker on own account", "employer" or "unpaid family worker". The Office concluded in its note that at the international level both words had a comprehensive meaning. (Endnote 23)

86. The Committee of Experts on the Application of Conventions and Recommendations has stressed that:

No provision of the Convention limits its scope as regards either individuals or occupations. It embraces all sectors of activity, it covers both public service and private employment and occupations, it extends to independent workers as well as to those working for wages or a salary, as is clearly shown by the broadness of the expression "employment and occupation" and from the preparatory discussions on the Convention.

Referring to the provisions of Recommendation No. 111, adopted together with the Convention, and which spells out the elements to be taken into consideration, the Committee of Experts emphasised:

the importance of non-discrimination in vocational training, on which actual prospects of access to employment and occupations depend.

The Committee pointed out that:

The problem of equality of opportunity and treatment arises not only in connection with restrictions or limitations imposed directly, ... it covers the possibility of access to the various senior levels and progress in employment (advancement), as well as continuity in the employment or occupation. (Endnote 24)

Articles 2 and 3 (obligations arising from the provisions of the Convention)

87. The essential obligation provided for by Article 2 of the Convention is:

to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practices, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

88. Article 3 specifies the measures to be taken, amongst which are the following:

- to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy (Article 3(b));

- to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy (Article 3(c));

- to pursue the policy in respect of employment under the direct control of a national authority (Article 3(d)).

89. The Committee of Experts on the Application of Conventions and Recommendations has made the following observations:

As regards political opinion, measures inconsistent with the principles of equality of employment and occupation may result from legislation or administrative practices in numerous ways, directly or indirectly. ... Numerous provisions or practices are liable to lead in fact to discrimination based on political opinions, when the definitions used are too vague or too general and the guarantees inadequate. Inequalities in respect of employment and occupation are often merely one of the consequences of general legal or administrative measures intended to repress or prohibit certain political opinions. In regulating specific questions of employment and occupation, measures as regards vocational training, for example, can lead to restrictions on use of certain training facilities, on the basis of the position of the persons concerned with regard to the political, social or other principles of the regime in power. ... (Endnote 25)

The Committee of Experts has noted that:

It is in the specific field of public or state-controlled employment that legislative provisions or administrative practice seem most often liable to run counter to equality of employment and occupation for purely political reasons; if it may be admissible, in the case of certain higher posts which are directly concerned with implementing government policy, for the responsible authorities generally to bear in mind the political opinions of those concerned, the same is not true when conditions of a political nature are laid down for all kinds of public employment in general or for certain other professions: for example, when there is a provision that those concerned must make a formal declaration of loyalty and remain loyal to the political principles of the regime in power. ... Any provisions or practices which might thus have the effect of impairing equality of opportunity or treatment in employment or occupation, purely on the basis of political opinion, should be eliminated in accordance with the 1958 instruments. (Endnote 26)

90. The Committee of Experts has also pointed out:

The responsibility of the State in pursuing a policy against discrimination with regard to employment under its control is of particular importance. The State possesses in this field direct means for applying this policy and their utilisation constitutes one of the most elementary obligations under the Convention. Non-discrimination in public employment is of considerable importance as an instrument for promotion and integration. ... It is also, undoubtedly, the sector which is the most exposed to preferences or exclusions based on opinions or beliefs. (Endnote 27)

Article 4

91. Article 4 of the Convention provides that:

Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice.

92. During the first discussion of the draft Convention in 1957, the competent Conference Committee adopted an amendment proposed by the Employers' members providing that the provisions of the Convention "shall not affect any statutory provision or administrative regulation which relates to the national security of a Member." However, in the Committee as well as in the plenary sitting of the Conference and in the written replies of certain governments objections were raised to this text, which might lead to abuse. During the second discussion in 1958, the draft was replaced by an amendment proposed by the Workers' members, corresponding to the present text of Article 4. (Endnote 28)

93. The Committee of Experts on the Application of Conventions and Recommendations has observed that of Article 4:

excludes, first of all, any measures taken not because of individual activities but by reason of membership of a particular group or community; such measures could not be other than discriminatory. Secondly, it refers to "activities" prejudicial to the security of the State (which must be proved or justifiably suspected on sufficiently serious grounds) as distinct from intentions. Finally, it rests on the protection of the security of the State, the definition of which should be sufficiently narrow to avoid the risk of coming into conflict with any policy of non-discrimination ... While some national provisions appear at first sight to contain a sufficiently precise definition of what constitutes a threat to the security of the State, others are couched in such broad terms (covering for example lack of "loyalty", "the public interest", "anti-democratic" behaviour, membership in or support of

certain political movements, etc.) that in the absence of detailed information as to their application in practice it is not possible to be certain that use might not be made of them for reasons related solely to political opinion. (Endnote 29)

The Committee has also stressed that:

Measures designed to protect the security of the State within the meaning of Article 4 of the Convention must also be clearly defined and so worded as not to form a basis for discrimination based solely upon political opinion. (Endnote 30)

94. Moreover, as already noted, the Committee has observed that:

The protection afforded by the Convention is not limited to differences of opinion within the framework of established principles. Therefore even if certain doctrines aim to bring about fundamental changes to institutions of the State this does not constitute a reason for considering their propagation beyond the protection of the Convention, in the absence of the use or advocacy of violent or unconstitutional methods to bring about that result. (Endnote 31)

95. Finally, according to the Committee of Experts:

The enforcement through the courts will not suffice to guarantee the application of the standards of the Convention, if the provisions which the courts have to apply are themselves incompatible with these standards. (Endnote 32)

96. The committee set up by the Governing Body to examine the representation made in 1984 by the World Federation of Trade Unions concerning the observance of the Convention by the Federal Republic of Germany, made the following observations concerning Article 4 of the Convention:

The Committee recognises that considerations relating to the security of the State may require the imposition of special conditions to ensure reliability, integrity and loyalty, not only in the public sector but also in private employment. It is important, however, that such requirements should be imposed with due regard to the nature of the position or functions and not be extended to a wider range of employments or occupations. The application of measures designed to safeguard the security of the State should therefore be examined in the light of the effect which particular activities could have on the effective discharge of the functions in question. There are certain areas of State activity, such as those related to defence and foreign relations, which are especially "security-sensitive", and where it is there-fore normal for a State to apply particularly strict criteria and procedures to ensure that the security of the State is not placed at risk. On the other hand, there are other areas of public employment where the risk of prejudice to State security is much less evident. It has also to be remembered that, under Article 4, there is no requirement that any illegal act should have been committed, much less that a conviction should have been secured. Unless the application of measures taken in the name of State security is restricted in accordance with criteria of the kind mentioned above, there exists the danger, and indeed the likeli-hood, that they will result in distinctions and exclusions on the basis of political opinion, contrary to the Convention. The Committee of Experts rightly stressed that the definition of the security of the State should be sufficiently narrow to avoid the risk of coming into conflict with the policy of non-discrimination. (Endnote 33)

CHAPTER 4

EARLIER EXAMINATION OF THE SITUATION BY ILO SUPERVISORY BODIES

97. The questions which the Commission was called upon to examine have previously been considered by the bodies responsible for regular supervision of the application of ratified Conventions (Committee of Experts and Conference Committee on the Application of Conventions and Recommendations) and also within the framework of the examination by the Governing Body of an earlier representation made in pursuance of article 24 of the ILO Constitution.

98. Comments concerning the rules and practices in force in the Federal Republic of Germany as regards verification of loyalty to the basic order of applicants for employment in the public service and of public officials were addressed to the ILO in November 1975 by the World Federation of Trade Unions and in January 1976 by the World Federation of Teachers' Unions. In 1976, referring to these comments, the Committee of Experts on the Application of Conventions and Recommendations

requested the Government of the Federal Republic to indicate, on the basis of court decisions and administrative instructions at the federal, Länder and communal levels, the criteria applied in assessing loyalty to the Constitution. It also asked whether these requirements were the same for all public service posts, and what procedural safeguards and avenues of appeal were available to those concerned. (Endnote 34)

99. In an observation in 1977, the Committee of Experts noted with interest that the principles governing verification of loyalty to the Constitution approved on 19 May 1976 prescribed procedural guarantees, in particular, regarding notification to interested parties of facts held against them, their right to submit observations and to be assisted by a legal adviser, and various conditions designed to facilitate exercise of their right of appeal to the courts. The Committee noted that the Government had undertaken to compile information on the regulations applied in the Länder, and expressed the hope that the Government would forward this information as well as information on the nature of requirements regarding loyalty to the Constitution to be satisfied for the various types of public service jobs concerned. (Endnote 35) In a direct request addressed to the Government, the Committee referred to the principles for verifying loyalty to the Constitution, laid down in the decision by the Federal Constitutional Court of 22 May 1975 (reaffirmed in a Bundestag resolution of 24 October 1975). It considered that these principles by themselves did not provide sufficiently specific criteria regarding the relationship to be established between requirements as to loyalty and considerations deriving from political opinions which depended on the nature of the public service or employment in question. It asked the Government to indicate the steps taken to lay down more specific criteria in the matter.

100. On 24 January 1978, the World Federation of Trade Unions presented a representation under article 24 of the Constitution alleging the widespread application of the so-called "work ban" in the public service in the Federal Republic of Germany. The WFTU referred, more particularly, to the adoption on 28 January 1972 of a decree by the Prime Ministers of the Länder and of a common declaration with the Federal Chancellor, to the judgment of the Federal Constitutional Court of 22 May 1975, and to the principles for investigating loyalty to the Constitution adopted on 19 May 1976.

101. In its report of 1978, the Committee of Experts noted that a representation had been made by the World Federation of Trade Unions, and indicated that it was deferring examination of the matter until the consideration of the representation had been completed. (Endnote 36)

102. The committee set up by the Governing Body to examine the representation adopted its report on 15 June 1979. It noted that the decision of the Federal Constitutional Court of 22 May 1975 regarding the obligation of loyalty in the public service did not specify the nature of the elements which might be taken into consideration in individual cases and left wide discretion to the employing authorities in this respect. The committee noted that a new version of the principles for verification of loyalty to the Constitution for the federal administration had been adopted on 17 January 1979. It considered that these procedural principles appeared likely to limit the powers in question, by establishing a presumption of loyalty and by abandoning the practice of systematic inquiries. The committee noted that the explanatory statement of the new principles indicated that it appeared necessary to abandon rules of procedure which implied that applicants could be rejected on the basis of an abstract criterion such as membership in an organisation with objectives regarded as hostile to the Constitution. The committee concluded that the effect of the 1979 procedural principles would depend on their future practical application, which would be subject to examination in accordance with established ILO procedures. It observed that this examination would also cover the evolution of the situation at the level of the Länder, which had been able to apply different principles and where cases involving inquiries had been proportionally more numerous than in the federal administration. (Endnote 37) At its 211th Session (November 1979), the Governing Body took note of the committee's report and declared the closure of the procedure.

103. In comments made in 1980, 1981 and 1982, the Committee of Experts, having noted the report of the Governing Body committee, resumed its examination of the question. Referring to the above-mentioned principles concerning verification of 1979, it asked the Government to supply detailed information on the practical application of these rules and on developments in the situation in the Länder. (Endnote 38)

104. The Committee on the Application of Conventions and Recommendations examined the matter at the 67th and 68th Sessions of the Conference (1981 and 1982). At the latter session, it expressed the hope that detailed information would be supplied to the Committee of Experts to enable it to continue its examination of the compatibility of national law and practice

with the Convention. (Endnote 39)

105. In comments made in 1983, the Committee of Experts recalled that it had asked the Government to supply information on the investigations carried out, the points taken into consideration and the decisions reached in cases of exclusion from the public service that had occurred since April 1979, as well as copies of any provisions or directives newly adopted, in particular by the Länder, and of recent decisions by administrative courts and the Constitutional Court in the matter. The Committee observed that in the absence of the details requested concerning the cases of exclusion from public service, both as regards candidates for employment and persons already in employment who were dismissed, at the federal level and in the various Länder, it remained unable to carry out a full examination of the situation, as contemplated by the Governing Body committee.

106. Having examined four judgments of the Federal Administrative Court rendered in November 1980 and October 1981, copies of which had been supplied by the Government, the Committee of Experts noted that in the cases concerned the grounds for exclusion from public employment did not relate to the inherent requirements of particular jobs. The Committee expressed the hope that measures would be taken to bring legislation and practice into conformity with the Convention, both with regard to public servants and candidates for public service, and whether they were employed under a labour contract or as civil servants. The measures to be taken should not only redefine the criteria for exclusion from the public service, but also 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. (Endnote 40)

107. At the 69th Session of the Conference (1983), the Committee on the Application of Conventions and Recommendations stressed the importance of the measures called for by the Committee of Experts. (Endnote 41)

108. In its report of 1985, the Committee of Experts noted that a representation alleging non-observance of the Convention as regards equality of opportunity and treatment in public employment had been made by the World Federation of Trade Unions under article 24 of the ILO Constitution and was still being examined by the Governing Body. In accordance with established practice, the Committee deferred further comment on the matter pending conclusion of that procedure. (Endnote 42)

CHAPTER 5

STRUCTURE OF THE PUBLIC SERVICE AND THE LEGISLATION GOVERNING THE PUBLIC SERVICE IN THE FEDERAL REPUBLIC OF GERMANY

109. This chapter reviews the constitutional structure of the State; the structure of the public service; the fundamental rights guaranteed by the Constitution; and the public service legislation, in particular the definition of public service and the rights and duties of officials; the concept of the duty of faithfulness to the free democratic basic order, its application in guide-lines at federal and Land level and its interpretation by the courts.

Constitutional structure of the State

110. Division of powers between the Federation and the Länder. The Constitution (Basic Law) of the Federal Republic of Germany institutes a federal State. The Constitution is based on the principle that competence vests in the Länder, the Federation being competent only to the extent recognised by the Constitution (see in particular Articles 30 and 70 of the Constitution). The Constitution (Articles 70-75) defines and enumerates the fields of exclusive competence, those of concurrent competence and those in which the Federation is competent to enact outline legislation. Article 31 of the Constitution provides that federal law shall override Land law. The Federation has the exclusive power to legislate on, inter alia, the Federal Railways, the Federal Postal Service and the legal status of persons in the service of the Federation and of corporations under public law directly subordinate to the Federation. It has concurrent legislative powers, in so far as it does not possess exclusive powers, with regard to the remuneration of members of the public service serving under a relationship governed by public law. The Federation has outline legislative powers - the right to lay down basic rules - concerning the legal relationships of persons in the public service of the Länder, local authorities and other public bodies. The Federation also possesses outline legislative powers with regard to the general principles of higher education. The effect of these provisions is

that, subject to the outline legislative powers of the Federation, the Länder are competent, inter alia, in matters of education.

111. Legislative and executive powers. At the federal level legislative power vests in the Federal Diet (Bundestag), elected by universal suffrage, and the Federal Council (Bundesrat), whose members are appointed by the Land Governments. Executive power is exercised by the Federal President, who is Head of State, elected by the Federal Convention, and by the Federal Chancellor, elected by the Bundestag, who is head of the Federal Government. The Federal Ministers, together with the Chancellor, constitute the federal cabinet; they are appointed by the Federal President on the nomination of the Chancellor (Articles 38-69).

112. At Land level legislative power is generally exercised by a single elected chamber; a bicameral system prevails in Bavaria. Some Länder are governed by a cabinet which is presided over by a Prime Minister elected by the single chamber. In other Länder, such as Bremen and Hamburg, the executive, known as the Senate, is elected. The Senate appoints a mayor (Bürgermeister) (Hamburg, West Berlin) or a Senate President (Bremen). The territory of the Federation is divided into communes (Gemeinde), the administrative unit above which is generally a county (Landkreis). These communities are governed by the law on local authorities, which falls within the competence of the Länder.

113. Judiciary. Pursuant to the Constitution, judicial power is exercised by the Federal Constitutional Court, the federal courts and the Land courts (Constitution, Article 92).

114. The administrative judicial system is made up of local administrative courts (Verwaltungsgerichte), regional administrative courts (Oberverwaltungsgerichte or Verwaltungsgerichtshöfe) and the Federal Administrative Court (Bundesverwaltungsgericht). The Federal Disciplinary Court (Bundesdisziplinargericht) rules at first instance on disciplinary cases concerning federal officials. Appeals from the decisions of the Federal Disciplinary Court lie to the Federal Administrative Court. The system of labour courts comprises three levels, the highest authority being the Federal Labour Court (Bundesarbeitsgericht). The labour courts have jurisdiction in matters concerning salaried employees and wage-earners in the public service whose employment relationships are governed by private law.

115. The Federal Constitutional Court (Bundesverfassungsgericht) is the highest judicial organ. Pursuant to the provisions of the Constitution (Articles 21 and 93) it is called upon in particular to rule on disputes concerning competence between the Federation and the Länder, the constitutionality of the laws, and constitutional complaints, which may be filed by any person who claims that public authorities have infringed one of his fundamental rights or one of the rights defined, in particular, in Article 33 of the Constitution, which deals with the equality of citizens and with the public service. The Court also rules on the question of unconstitutionality of parties.

116. Execution of the laws. The Constitution provides for execution of the federal laws either by the Länder, under the supervision of the Federation or, in specified cases, by delegation from the Federation (Articles 83, 84 and 85), or by the Federation itself in cases specified by the Constitution (e.g. the Federal Railways and the Federal Postal Service) or pursuant to the Constitution: for example, the Federation is authorised to establish, for matters on which it has the power to legislate, independent higher federal authorities, new corporations and institutions directly subordinate to the Federation, and central offices for the police, for the protection of the Constitution and for the information services (Article 87).

117. With regard to the execution of the laws of the Länder it is recognised, by reference to Article 30, that the administrative competence of the Federation may be relied upon only in so far as it derives from the Constitution.

118. The Constitution guarantees the principle of the administrative autonomy of local authorities and associations of local authorities (Article 28).

Structure of the public service

119. The constitutional and administrative structure of the country is reflected in the structure of the public service, which is subordinate either to the Federal Administration and federal services, or to the administration of the Länder and services attached to it, or again to the administration of local authorities.

120. Within those administrations, the following categories of staff may be distinguished according to the body or unit employing them:

- staff employed by the direct public service, i.e. by the Federation, the Länder, local authorities and associations of local authorities, the Federal Railways and the Federal Postal Service;
- staff employed by the indirect public service, i.e. by the Federal Employment Institution, social insurance institutions and supplementary welfare institutions.

121. According to the nature of the legal regime governing their employment relationships with their employer, the following categories of staff may be distinguished among the staff of the direct and indirect public service:

- officials (Beamte) whose legal status is regulated by law and whose service relationship is governed by public law;
- salaried employees (Angestellte) and wage-earners (Arbeiter) whose employment relationships are governed by private law under conditions fixed by collective agreements.

122. On 30 June 1984 the total staff employed full or part-time in the public service numbered approximately 4,554,000, including 4,311,000 in the direct public service and 243,000 in the indirect public service, representing some 17 per cent of the total economically active population. (Endnote 43)

123. The tables below show the composition of the staff, by officials and judges, salaried employees and wage-earners, in the direct public service on 30 June 1984, distinguishing between full-time and part-time staff:

Table 1: Full-time staff in the direct public service (situation on 30 June 1984)

 Field of activity Officials Salaried Wageearners Total
 and judges employees

Federal administration 114 579 89 573 109 499 313 651

Federal Railways 176 681 6 903 123 338 306 922

Federal Postal Service 296 384 33 950 105 671 436 005

Federation (total) 587 644 130 426 338 508 1 056 578

Länder 954 140 462 388 161 270 1 577 798

Local autho-

rities/associations

of local authorities 146 773 511 798 278 380 936 951

Syndicates of local

authorities 2 039 21 508 10 875 34 422

Total 1 690 596 1 126 120 789 033 3 605 749

Source: Federal Bureau of Statistics.

Table 2: Part-time staff in the direct public service (situation on 30 June 1984)

Field of activity Officials Salaried Wageearners Total

and judges employees

Federal administration 638 12 102 4 341 17 081

Federal Railways 495 668 1 975 3 138

Federal Postal Service 7 789 24 307 63 067 95 163

Federation (total) 8 922 37 077 69 383 115 382

Länder 107 505 167 857 42 515 317 877

Local autho-

rities/associations

of local authorities 3 099 111 281 145 689 260 069

Syndicates of local

authorities 31 4 960 7 110 12 101

Total 119 557 321 175 264 697 705 429

Source: Federal Bureau of Statistics.

124. The staff in the indirect public service included, on 30 June 1984, some 26,000 officials, 195,000 salaried employees and 21,000 wage-earners. In addition there were at that date 271,000 persons undergoing training in the public service, including 120,700 with the status of officials, 98,300 as salaried employees and 52,700 as wageearners. The staff in training in the direct public service included in particular 128,000 persons in the service of the Länder, of whom 91,000 had the status of officials.

125. By nature of work, the staff employed full-time by the Federation, the Länder, local authorities and the associations of local authorities included 1,079,000 persons in the general administrative service (Federation: 271,000; Länder: 559,000; local authorities and associations of local authorities: 248,000), of whom 475,000 were employed in political direction and central administration (Federation: 70,000; Länder: 215,000; local authorities and associations of local authorities: 189,000) and 298,000 in services responsible for law and order (Federation: 28,000; Länder: 211,000; local authorities and associations of local authorities: 58,900). A total of 768,000 were employed in education, science and research (Federation: 9,400; Länder: 654,000; local authorities and associations of local authorities: 104,000), including 558,900 in schools and pre-school education (Länder: 487,000; local authorities and associations of local authorities: 71,200).

Fundamental rights guaranteed by the Constitution and guarantees for political parties

126. Since the question before the Commission relates to exclusion from the public service on grounds connected with political opinions and activities, it is appropriate to examine fundamental rights in respect of freedom of opinion, political activity and guarantees enjoyed by political parties.

127. The Constitution, in Chapter I (Articles 1-19), guarantees a number of fundamental rights which are binding upon the legislature, the executive and the judiciary as directly applicable law. It guarantees in particular the dignity of the human person; the free development of the personality; the right to life and physical integrity; freedom of the individual; and freedom of religious and philosophical belief (Articles 1, 2 and 4). Article 3 of the Constitution guarantees the equality of all persons before the law; Article 3, paragraph 3, provides that "no one may be disadvantaged or favoured by reason of his sex, his descent, his race, his language, his homeland and origin, his faith, or his religious or political opinions." Freedom of opinion is guaranteed by Article 5; paragraph 1 of that Article provides in particular that "everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures" and guarantees freedom of the press and freedom of reporting. By virtue of Article 5, paragraph 2, "these rights are limited by the provisions of the general laws, by the provisions of law for the protection of youth, and by the right to respect for personal honour". Paragraph 3 provides that "art and science, research and teaching shall be free; freedom of teaching shall exempt no one from the duty of faithfulness to the Constitution". Article 9 guarantees freedom of association. Paragraph 1 of that Article provides that "all Germans shall have the right to form associations and societies". Paragraph 2 provides that "associations whose purposes or activities contravene the criminal laws or which are directed against the constitutional order or the idea of international understanding are prohibited". Article 12 guarantees free choice of job. Paragraph 1 of that Article provides that "all Germans shall have the right freely to choose their occupation, place of work and place of training. The practice of occupations may be regulated by or pursuant to a law".

128. Article 21 of the Constitution, which forms part of the chapter entitled "The Federation and the Länder", guarantees the free establishment of political parties, specifies the circumstances in which a party is unconstitutional and declares the Federal Constitutional Court competent to decide on the question of unconstitutionality. Article 21, which is regarded as establishing a "privilege for parties", provides as follows:

1. Parties shall participate in forming the political will of the people. They may be freely established. Their internal organisation

must conform to democratic principles. They must publicly account for the sources of their funds.

2. Parties which, judged by their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality.

3. Details shall be regulated by federal laws.

129. The Federal Constitutional Court Act provides, in section 43(1), that application for a decision on the unconstitutionality of a party may be made by the Bundestag, the Bundesrat or the Federal Government. The government of a Land may make such an application only against a party whose organisation is limited to the territory of that Land (section 43(2)).

130. Pursuant to Article 21, the Federal Constitutional Court ruled in 1952 on the question of unconstitutionality of the Socialist Reich Party (SRP), (Endnote 44) and in 1956 on that of the Communist Party of Germany (KPD). (Endnote 45) In each of these cases the Court declared the party unconstitutional, dissolved it and prohibited the formation or continuation of substitute organisations.

131. Since giving those two decisions, the Federal Constitutional Court has not been seized of other cases under Article 21, paragraph 2, for the purpose of ruling on the unconstitutionality of a political party.

132. In the aforementioned decision of 1952 the Court considered the interpretation of Article 21 of the Constitution, spelling out in particular the conditions under which a party might be held to be unconstitutional and defining the meaning to be attached to the notion of the free democratic basic order:

The special importance of parties in a democratic State justifies their exclusion from political life, not when they merely oppose individual provisions, or even entire aspects, of the Constitution by legal means, but only when they seek to upset the supreme basic values of the free democratic constitutional State. These basic values constitute the free democratic basic order, which the Basic Law regards as fundamental within the general order of the State - the "constitutional order" ...

A free democratic basic order (within the meaning of Article 21, paragraph 2, of the Basic Law) is an order which, to the exclusion of any violence and arbitrary rule, constitutes a system of rule proper to a State based on law, on the basis of self-determination of the people, in accordance with the will of the prevailing majority, and of freedom and equality. The fundamental principles of this order must include at least the following: respect for the human rights defined in the Basic Law, and above all for the right to life and free development, the sovereignty of the people, the separation of powers, the accountability of Government, the legality of administration, the independence of the courts, the multiparty system and equality of opportunity for all political parties with the right, in accordance with the Constitution, to formation and practice of an opposition.

In the opinion of the Court, Article 21, paragraph 1:

recognises that parties contribute to the formation of the political will of the people, and thus raises them from the politico-sociological area to the rank of a constitutional institution. Only those parties which base themselves on the free democratic basic order can participate in a politically meaningful way in this "incorporation" of parties in the constitutional structure. This is confirmed by Article 21, paragraph 2. It has the significance to make it possible to find that a particular party may not participate in forming the political will of the people because it combats the free democratic basic order. Solely in virtue of considerations proper to a State based on law is it provided that a finding of unconstitutionality with legal effect cannot be made by anyone, not even by the Government and the administration, nor in any proceedings, but only by a judgement of the Federal Constitutional Court in proceedings serving the investigation of material truth.

133. In its decision concerning the KPD the Court found as follows:

A party is not unconstitutional merely because it does not recognise the supreme principles of a free democratic basic order; there must also be an actively combative, aggressive attitude to the existing order ... Article 21, paragraph 2, of the Basic Law

does not require, like section 81 of the Penal Code, a concrete undertaking; it is sufficient if the party's political course is determined by an intention which is fundamentally and in its long-term tendency directed towards combating the free democratic basic order ... A party is unconstitutional already if it strives for a social and political form of free democracy other than the present one in the Federal Republic in order to use it as a transitional stage, the more easily to eliminate any free basic order ... (Endnote 46)

134. In 1961, with reference to the examination of the constitutionality of a section of the Penal Code, the Federal Constitutional Court had occasion to state as follows:

Until such time as the Federal Constitutional Court has ruled, no one may in law invoke the unconstitutionality of a party. To this extent such a ruling constitutes a precondition.

The privilege provided for in Article 21, paragraph 2, of the Basic Law, which in the first place protects the party organisation, also extends to the official party activity, by generally permitted means, of a party's officials and adherents. Their activity is protected by the parties' privilege even if their party is declared unconstitutional by a subsequent decision of the Federal Constitutional Court.

The legal system cannot, without violating the basic principle of the rule of law, treat as illegal *ex post facto* the constitutionally granted freedom to found a party and to work for it in constitutional life. (Endnote 47)

135. However, when examining the constitutionality of a provision of the Civil Service Act of the Land of Schleswig-Holstein, with reference to the appointment of a candidate to the civil service, the Federal Constitutional Court, in a decision of 22 May 1975, ruled as follows:

An element of behaviour that may be important in the evaluation of the candidate's personality which is required here may also be the fact of joining or belonging to a political party that pursues aims hostile to the Constitution, regardless of whether that party has been found unconstitutional by judgement of the Federal Constitutional Court or not. It would be quite arbitrary to exclude that element of personality from evaluation, and thus to compel the employer to affirm an official's faithfulness to the Constitution because there is no decision of the Federal Constitutional Court on the unconstitutionality of a party - a decision, moreover, that depends on an application which is left largely to the applicant's discretion and is most unlikely to be made solely in order to make it possible to reject candidates for the civil service or to take disciplinary action against officials for breach of their duty of political faithfulness.

The fact that the decision reserved to the Federal Constitutional Court concerning the unconstitutionality of a political party has not yet been taken does not mean that the conclusion cannot be reached and relied upon that that party pursues aims hostile to the Constitution and ought therefore to be combated politically. (Endnote 48)

136. The Court thus distinguished between the "unconstitutionality of a party", to be found by decision of the Court pursuant to Article 21, paragraph 2, and "aims hostile to the Constitution" of a party, the finding of which does not depend upon such a decision.

Public service legislation

137. Definition and composition of the public service. The basic provisions concerning public service are set forth in Article 33 of the Constitution, which provides as follows:

(1) Every German shall have in every Land the same civic rights and duties.

(2) Every German shall have equal access to every public post according to his ability, qualifications and occupational performance.

(3) The enjoyment of civil and civic rights, admission to public posts and rights acquired in the public service shall be independent of religious faith. No-one may suffer any disadvantage by reason of his adherence or non-adherence to a faith or

outlook.

(4) The exercise of sovereign powers as a permanent function shall as a rule be entrusted to members of the public service who are in a relationship of service and faithfulness governed by public law.

(5) The law of the public service shall be regulated with due regard for the traditional principles governing service as officials.

138. Article 33 is not limited to the situation of persons who have the status of officials. In particular, the guarantees laid down in paragraphs 2 and 3 relate to employment in the public service in general, irrespective of the nature of the service relationship.

139. The Federation has adopted two main Acts concerning the status of officials: the Federal Civil Service Act (Bundesbeamtengesetz, BBG) (Endnote 49) and the Civil Service (General Principles) Act concerning officials of the Länder (Beamtenrechtsrahmengesetz, BRRG). (Endnote 50) In accordance with the latter, the Länder have adopted Acts regulating conditions of service of their officials. (Endnote 51)

140. The Federation and the Länder have, in their respective spheres of competence, adopted Acts on disciplinary procedure and staff representation for officials.

141. The Federal Civil Service Act governs the conditions of service of officials of the Federation. It deals in particular with their service relationships, rights and duties.

142. According to section 2 of the Act, the expression "federal official" means any person who is in a relationship of service and faithfulness under public law with the Federation or with a corporation, institution or foundation under public law directly subordinate to the Federation (section 2(1)). An official who has the Federation as his employer is a direct federal official. An official who has as his employer a corporation, institution or foundation under public law directly subordinate to the Federation is an indirect federal official (section 2(2)).

143. According to section 4 of the Act, appointment as an official is permissible only for the performance of:

(1) functions which involve the exercise of sovereign powers (hoheitsrechtliche Aufgaben), or

(2) functions which, for the purpose of maintaining the State or public life, may not be entrusted exclusively to persons who are in an employment relationship under private law.

144. The Act distinguishes several categories of officials, namely officials for life, officials on probation, revocable officials, honorary officials and temporary officials.

145. According to section 5, a person may be appointed an official for life (auf Lebenszeit) if he is to be employed permanently in functions within the meaning of section 4, and on probation (auf Probe) if he has to complete a period of probation with a view to subsequent employment as an official for life. A person may be appointed a revocable official (auf Widerruf) if he has to complete the prescribed or customary preparatory service (Vorbereitungsdienst) or is to be employed in functions within the meaning of section 4 only incidentally or temporarily. A person who performs functions within the meaning of section 4 in an honorary capacity is an honorary official (Ehrenbeamter). Lastly, the Act provides that the statutory provisions under which persons may be appointed as officials for a specified period (Zeitdauer) remain unchanged.

146. A candidate for the civil service must fulfil certain conditions with regard to training, must in principle be of German nationality and must satisfy the authorities that he will at all times uphold the free democratic basic order within the meaning of the Basic Law (section 7).

147. The Civil Service (General Principles) Act for the Länder contains provisions to be observed by the Länder in regulating their own civil services, with due regard for the traditional principles of the civil service and the common interests of the Federation and the Länder. The provisions of the General Principles Act and those of the Federal Civil Service Act largely

correspond. (Endnote 52)

148. The status of an official is characterised in particular by the following:

- the formal nature of that status (admission to the civil service, termination and promotion are governed by a formal decision);
- recruitment, in principle, for life: the official undertakes on oath to perform his professional duties conscientiously and to abide by the law;
- the employer undertakes to provide financially for the official's needs through payment of a salary or, in the case of a retired official, a pension (non-contributory system); (Endnote 53) an official for life may be dismissed on the employer's initiative only in virtue of formal disciplinary proceedings in which removal from the service is decided upon by a disciplinary court; (Endnote 54)
- the performance of service on the career principle. (Endnote 55)

149. With regard to the other two categories of public servants, i.e. salaried employees (Angestellte) and wage-earners (Arbeiter), section 191 of the Federal Civil Service Act provides that the employment relationships of salaried employees and wage-earners in the service of the Federation or of a corporation, institution or foundation under public law subordinate to the Federation shall be governed by collective agreements.

150. There is a collective agreement that covers salaried employees in the service of the Federation (except the Federal Railways and the Federal Postal Service), the Länder and local authorities to the extent that distinct agreements have not been concluded. (Endnote 56)

151. The wage-earners employed by the Federation, (Endnote 57) the Länder (Endnote 58) and local authorities, for their part, are also covered by general collective agreements.

152. There are specific agreements for, among others, the Federal Railways and the Federal Postal Service.

153. Although the Constitution (Article 33, paragraph 4), the Federal Civil Service Act (sections 2 and 4) and the Civil Service (General Principles) Act for the Länder (section 2(2)) distinguish between officials and other categories of members of the public service according to the functions they are to perform, it has been noted that in reality it is not the nature of the public servant's activity that determines whether he is an official, a salaried employee or a wage-earner. The sole deciding factor is whether he has been appointed as an official or recruited on a labour contract. That is why persons performing functions which involve the exercise of sovereign powers may be salaried employees and, conversely, persons not performing such functions may be appointed officials. The latter situation is the more frequent, because Article 33, paragraph 4, of the Constitution allows functions involving the exercise of sovereign powers to be assigned to non-officials only in exceptional cases. (Endnote 59)

154. It has also been noted that the situation in the various services, in particular the budgetary situation with regard to jobs, as well as historical developments, do not allow any strict delimitation of the functions assigned to officials on the one hand and to salaried employees and wage-earners on the other. (Endnote 60) Over the years, the fields of activity of officials and salaried employees have intermingled. On the one hand, officials have been employed in functions not involving the exercise of sovereign powers, e.g. in the Postal Service and the Federal Railways; on the other, salaried employees have taken jobs involving the exercise of sovereign powers formerly reserved to officials. (Endnote 61)

155. The rights and safeguards of officials in the recruitment process. The basic provisions governing access to the public service are laid down in Article 33, paragraphs 2 and 3, of the Constitution. Article 33, paragraph 2 provides that "every German shall have equal access to every public post according to his ability, qualifications and occupational performance".

156. Article 33, paragraph 3, provides, inter alia, that no one may suffer any disadvantage by reason of his adherence or non-adherence to a faith or outlook.

157. Moreover, Article 3, paragraph 3, of the Constitution guarantees non-discrimination on grounds of political opinion among others, and Article 5 guarantees freedom of expression.

158. According to certain writers, (Endnote 62) Article 33, paragraph 2, of the Constitution merely guarantees access without discrimination to employment, but does not confer a right to be recruited to a post. The courts originally took the view that this Article merely conferred the right to submit one's candidature. Later they recognised that it conferred a justiciable right to an objective evaluation, and they intervene when a candidate can prove that he has been rejected on erroneous or irregular grounds. The courts are in principle authorised only to annul the decision and to refer the matter back for further decision by the recruiting authority. Some authors consider that Article 33, paragraph 2, confers a general right of access to the public service according to ability and qualifications. (Endnote 63)

159. The Federal Civil Service Act (section 8) and the Civil Service (General Principles) Act for the Länder (section 7) provide that candidates shall be selected according to their ability, qualifications and occupational performance, without regard to sex, descent, race, creed, religious or political opinions, origin or connections.

160. Under section 9(2) and section 6(2) respectively of those Acts, the employment relationship of an official on probation is to be converted to that of an official for life after not more than five years if the official satisfies the conditions prescribed for that purpose.

161. The procedure for the selection and evaluation of candidates is not governed by the Civil Service Acts. The Federal Civil Service Act provides only for the advertisement of vacancies (section 8(1)). The Federal Staff Representation Act confers on the staff committee a right of co-determination in matters of recruitment and appointment (section 76(1)).

162. A candidate who has been rejected without proper explanation may contest the recruiting authority's decision. This compels the authority to prove that it has taken an objective decision. It is required to submit the documents in the case to the court, which allows the candidate to examine them. The administrative courts, however, refuse on grounds of confidentiality to allow him to examine his competitors' files. (Endnote 64)

163. The salaried employees and wage-earners of the public service, to whom Article 33, paragraphs 2 and 3 of the Constitution apply, are selected accorded to essentially similar rules. The staff committee has a right of co-determination in matters of recruitment of salaried employees and wage-earners also (Federal Staff Representation Act, section 75(1)). The labour courts are competent to examine complaints from applicants concerning decisions rejecting them. (Endnote 65)

164. Job security. Upon final appointment, an official is appointed for life. Under sections 28-51 of the Federal Civil Service Act, the relationship may be terminated, apart from the official's death, by his resignation or dismissal, loss of the rights attached to the official capacity, revocation on disciplinary grounds, or retirement. (Endnote 66)

165. In the case of an official on probation, the Federal Civil Service Act lays down a number of additional grounds for termination and periods of notice which should normally be observed (section 31). Thus an official on probation may be dismissed for behaviour which in the case of an official for life would lead to disciplinary measures resulting from disciplinary proceedings; in that case the official on probation may be dismissed without notice. (Endnote 67) Grounds for dismissal also include deficient ability, qualifications or occupational performance; invalidity; and the abolition or restructuring of the service.

166. A revocable official may be dismissed at any time by revocation with the same notice as an official on probation (section 32). The Act provides that a revocable official should be given the opportunity to complete his preparatory service (Vorbereitungsdienst) and to take his examination. His status as an official ends with the examination (Endnote 68) in so far as that is provided for by statute or administrative regulations.

167. Under the Federal Disciplinary Regulations (Bundesdisziplinarordnung) an official for life may be dismissed only through formal disciplinary proceedings before the disciplinary courts. Under the Federal Staff Representation Act, the institution of formal disciplinary proceedings is subject to mandatory consultation of the staff committee (section 78(1)). This also applies to the dismissal of officials on probation and of revocable officials. (Endnote 69)

168. With regard to salaried employees and wage-earners, the provisions of the Protection against Dismissal Act apply to establishments and offices under public law. (Endnote 70) A dismissal is socially unwarranted and invalid, *inter alia*, if it is not based on reasons connected with the person or conduct of the employee or on urgent operating requirements or the works council has raised objections to the dismissal. The burden of proving the facts on which the dismissal is based lies upon the employer. Under the Federal Staff Representation Act, the staff committee participates in a case of ordinary dismissal and must be heard in a case of dismissal without notice or extraordinary dismissal. The dismissal of a member of the works council is not permitted unless there is a major reason warranting dismissal without notice. In this case the staff committee must give its consent; if it withholds its consent, the administrative court may, upon the employer's application, give its consent in lieu if the dismissal is warranted in the light of all the circumstances. Clause 53 of the Collective Agreement of Salaried Employees of the Federation prescribes the periods of notice to be given in cases of dismissal; after 15 years' service, a salaried employee aged 40 years or over may no longer be dismissed, save under the conditions and in accordance with the procedure prescribed in clause 55.

169. The duties of officials. The Federal Civil Service Act and the Civil Service (General Principles) Act for the Länder contain detailed provisions on the duties of officials, some of a general nature and others dealing with specific aspects such as professional secrecy, secondary occupations, the acceptance of rewards, hours of work, etc. The general obligations are set forth in sections 52, 53 and 54 of the Federal Civil Service Act and sections 35 and 36 of the Civil Service (General Principles) Act, which provide as follows:

An official serves the entire people and not a party. He shall perform his functions impartially and justly and in so doing shall have regard to the welfare of the community.

An official shall by his entire conduct bear witness to his support for the free democratic basic order within the meaning of the Basic Law and shall act to uphold it (section 52(1) and (2) and section 35(1) respectively).

An official shall, in political activity, maintain such moderation and reserve as are called for by his position in relation to the public and the duties of his office (sections 53 and 35(2) respectively).

An official shall devote himself to his occupation with total commitment. He shall perform his duties disinterestedly and conscientiously. His conduct in and outside the service shall be in keeping with the respect and confidence required by his occupation (sections 54 and 36 respectively).

In accordance with section 58 of the Federal Civil Service Act, a federal official must take the following oath:

"I swear to uphold the Basic Law of the Federal Republic of Germany and all laws in force in the Federal Republic and to perform the duties of my office conscientiously ..." (Endnote 71)

170. In the event of non-fulfilment of his obligations, an official may be subject to disciplinary action. Section 77 of the Federal Civil Service Act and section 45 of the Civil Service (General Principles) Act define the notion of a disciplinary offence and refer to the laws on disciplinary procedure (at federal and Land level) for proceedings in respect of disciplinary offences. According to these sections, an official commits a disciplinary offence if he culpably violates the obligations of his office. Conduct by an official outside the service constitutes a disciplinary offence if, according to the circumstances of the particular case, it is especially liable to impair respect and confidence in a manner significant for his functions or for the prestige of the civil service. (Endnote 72)

171. In the case of a retired official, activity directed against the free democratic basic order or participation in attempts to impair the existence or security of the Federal Republic, among other actions, constitutes a disciplinary offence. (Endnote 73)

Duty of faithfulness to the free democratic basic order

172. Historical and doctrinal context of the duty of faithfulness. As already noted, Article 33, paragraph 5 of the Constitution provides that public service law shall be regulated with due regard for the traditional principles governing service as officials. According to a decision of the Federal Constitutional Court dated 22 May 1975, (Endnote 74) the duty of faithfulness to the free

democratic basic order constitutes one of those traditional principles. The Court observed that the duty of faithfulness had been a continuous feature of the history of the German civil service since the end of the eighteenth century.

173. In the days of the German Empire (1871-1918) (Endnote 75) a twofold orientation was discernible in the relationship of an official (*Beamtenverhältnis*). The idea that prevailed in practice, going back to historical tradition, was that of a relationship of personal faithfulness to the monarch, extending also to the Government appointed by the monarch and subordinate to him. Political statements against the Government, even if made unofficially, and, more particularly, membership in an anti-monarchist political party were regarded as breaches of the official's duty of faithfulness. In writings on the subject, on the other hand, the prevailing idea was that of a body of officials placed in a situation of service to the State, governed by rights and duties. The duty of faithfulness was viewed as "the ethical side" of an official's relationship; its content lay in the requirement that the official should perform his duties with a heightened conscientiousness, and not in an existential personal bond with the monarch or the State. This conception was reflected in the Imperial Civil Service Act of 1873: the fundamental duty of the official as prescribed by the Act was related and limited to the conscientious performance, in accordance with the Constitution, of the functions incumbent on him; the formula "to be faithful and obedient" to the Emperor appeared only in the official's oath.

174. Under the Weimar Republic (after 1919) the Constitution guaranteed general access to public posts according to qualifications and occupational performance (section 128); it expressly guaranteed to officials freedom of political opinion and freedom of association (section 130). With regard to officials' duties, the provisions of the Imperial Civil Service Act remained the standard, with an obligation as to conduct (*Verhaltenspflicht*). Article 130 of the Constitution provided as follows: "An official serves the community, not a party. Freedom of political opinion and freedom of association are guaranteed to all officials ..." (Article 130, paragraphs 1 and 2).

175. The situation at that time with regard to freedom of political opinion has been described as follows: (Endnote 76)

In any case, an official cannot be subjected to a disciplinary penalty merely for having declared himself in favour of a political party. An official would be committing a disciplinary offence only if he sought to promote by specific acts the aims of the party he supported and if those aims included the violent overthrow of the existing state order. Freedom of opinion is not restricted, even in relation to unconstitutional aims or means. However, direct participation in acts directed towards achieving a party's aims by illegal means is incompatible with the holding of a public post. Outside the service, in exercising the rights guaranteed to him by Article 118 (freedom of opinion in general) and Article 130, an official, when participating in public demonstrations likely to go to extremes in the political field, should maintain the greatest reserve and be mindful of the various currents of political opinion. With regard to freedom of association, the question arises whether an official may promote, support or carry out other activities for a party or an organisation which is working, publicly or in secret, for the forcible overthrow of the existing state order and is in that sense revolutionary, or whether he may belong to such a party. According to the decisions of the courts, mere support of such a party is permitted to an official (OVG case 77); on the other hand, working on behalf of such a party through specific acts is forbidden (OVG case 78).

176. Similarly it has been pointed out (Endnote 77) that, with regard to the question whether membership or activity by officials in a revolutionary political party was compatible with the duties of those officials, the criteria on which to determine whether a party was revolutionary were not the political aims it pursued but the revolutionary - i.e. illegal and forcible - means of achieving them.

177. Owing to the political controversy associated with the new democratic foundation of the State, the constitutional and legislative provisions were fairly quickly made subject to limitations. The officials' oath took on the form of an oath of faithfulness ("I swear to be faithful to the Constitution"); an Act of 21 July 1922 on the duties of officials to protect the Republic added to the duties connected with the performance of their functions a general duty to uphold the constitutional and republican authority of the State (section 10(a)). This duty, however, was regarded not as a duty to profess faithfulness (*Bekanntnispflicht*) but as an obligation as to conduct connected with occupational activity (*Verhaltenspflicht*).

178. In publications concerning civil service law, the concept of faithfulness underwent reappraisal. The status of officials was characterised as a relationship of faithfulness to the State. The duty of faithfulness to a person - the monarch - reflected in

conduct towards that person, and particularly in obedience to his orders, was supplanted by the duty of faithfulness to an impersonal entity (the State) or to normative principles (the Constitution).

179. The Nazi period strengthened this concept of faithfulness and at the time exaggerated and perverted it. (Endnote 78)

180. Section 4 of the Act on the reform of the career civil service dated 7 April 1933 provided: "Officials who, through their political activities, fail to satisfy the authorities that they will uphold the national State unreservedly at all times may be dismissed."

181. The Act of 30 June 1933 to amend certain provisions concerning officials provided: "No one may become an official unless he satisfies the authorities that he will uphold the national State unreservedly at all times" (section 3(2)(a)).

182. The German Officials Act of 26 January 1937 replaced the words "national State" by "National Socialist State". Section 1 of the Act provided: "A German official is, in relation to the Führer and the Reich, in a situation of service and faithfulness under public law (status of an official)." Section 3(2) provided as follows: "An official shall uphold the National Socialist State unreservedly at all times and shall be guided in all his conduct by the fact that the National Socialist Workers' Party, in indissoluble union with the people, is the bearer of the idea of the German State."

183. Pursuant to section 4 of the Act, an official was required to confirm his special attachment to the Führer and the Reich by taking the following oath: "I swear that I shall be faithful and obedient to the Führer of the Reich and of the German people, Adolf Hitler; I shall abide by the laws and conscientiously fulfil the duties of my office ..."

184. Since 1945 the texts concerning the status of officials have provided that the situation of an official is "a situation of service and faithfulness under public law". At the same time officials are called upon to share in the concept of a "militant democracy" (*streitbare, abwehrbereite, wehrhafte Demokratie*) which, through institutional and legal arrangements, strives to protect itself against attack or elimination by enemies of the democratic order taking advantage of political freedom. (Endnote 79)

185. Some writers have observed that, just as the content of the Constitution is strongly determined by the will to create a free democratic State, that content also is fundamentally determined by the will to guarantee that the Federal Republic shall always remain a free democratic State. (Endnote 80) The will to protect the free democratic character of the Federal Republic is shown by the provisions for forfeiture of certain fundamental rights if they are abused for the purpose of combating the free democratic basic order (Article 18), the provisions under which parties may be ruled unconstitutional (Article 21) and the provisions prohibiting amendment of certain constitutional provisions (Article 79: federal structure, participation of the Länder in the legislative process, and basic principles laid down in Articles 1 to 20). (Endnote 81)

186. According to this view, a body of officials prepared to commit themselves to and identify themselves with the free democratic basic order appears to be necessary in order to prevent the recurrence of totalitarian upheaval. Democracy is looked to for active self-defence. It cannot allow persons regarded as extremists who wish to challenge that democratic order to enter the civil service. (Endnote 82) The normative connecting link through which to attain that goal lies in the character of the official's status as a relationship of faithfulness to the democratic State and in the provisions of the Civil Service Acts. (Endnote 83)

187. Legislative provisions at present in force. The Federal Civil Service Act (section 7, subsection 1(2)) and the Civil Service (General Principles) Act for the Länder (section 4, subsection 1(2)) provide that no one may be appointed as an official unless he "satisfies the authorities that he will at all times uphold the free democratic basic order within the meaning of the Basic Law".

188. According to section 52(2) of the Federal Civil Service Act and section 35(1), third sentence, of the Civil Service (General Principles) Act, an official must "by his entire conduct bear witness to his support for the free democratic basic order within the meaning of the Basic Law and act to uphold it".

189. By virtue of section 2 of the Federal Civil Service Act, which defines the scope of the Act, the duty of faithfulness rests

upon all officials in the service of the Federation or of a corporation, institution or foundation under public law subordinate to the Federation.

190. Similar provisions imposing a duty of faithfulness to the free democratic basic order are laid down in the civil service legislation of the Länder.

191. According to the courts, the duty of faithfulness to the free democratic basic order is binding on an official in his entire conduct, both in the performance of his functions and outside the service. (Endnote 84)

192. Principles for the verification of faithfulness. On 28 January 1972 the Federal Chancellor and the Prime Ministers of the Länder agreed upon a set of principles concerning the verification of faithfulness to the free democratic basic order of public servants and applicants for employment in the public service (commonly referred to as the "Radicals Decree" - Radikalenerlass). These principles were in turn reflected in decisions approved for the federal service and for service in the Länder. The latter text, also dated 28 January 1972, read as follows:

The Heads of Government of the Länder, in consultation with the Federal Chancellor on 28 January 1972, adopted the following principles on the proposal of the Permanent Conference of Ministers of the Interior of the Länder:

Under the Civil Service Acts, no one may be appointed as an official in the Federation or the Länder unless he satisfies the authorities that he will at all times uphold the free democratic basic order within the meaning of the Basic Law.

Officials are bound to work actively within and outside the service to uphold that basic order.

These are mandatory provisions. Each individual case must be examined and decided on its merits. The following principles shall be applied for that purpose:

Applicants:

An applicant who engages in activities hostile to the Constitution shall not be appointed to the public service. If an applicant belongs to an organisation which pursues aims hostile to the Constitution, such membership warrants doubts as to whether he will uphold the free democratic basic order at all times. Such doubts in general justify rejection of the application for appointment.

Officials:

If an official, by his actions or by reason of his membership in an organisation having aims hostile to the Constitution, fails to fulfil the requirements of section 35 of the Civil Service (General Principles) Act binding him to bear witness by his entire conduct to his support for the free democratic basic order within the meaning of the Basic Law and to act to uphold it, the employer shall, on the basis of the facts ascertained in each case, draw the required conclusions and in particular examine whether the removal of the official from office should be sought.

The same principles shall apply to salaried employees and wage-earners in the public service in accordance with the provisions of the relevant collective agreements.

193. Each Land adopted its own guide-lines for the application of these principles. They led to extensive verification, sometimes systematic but differently organised from one Land to another, of the faithfulness of applicants for employment in the public service and of officials.

194. On 22 May 1975 the Federal Constitutional Court, in a leading decision, enunciated principles applicable to verification of the faithfulness of applicants and officials (see paragraphs 214 et seq. below).

195. On 24 October 1975 the Bundestag adopted a resolution which, in the light of the Constitutional Court's decision, called for the respect of certain principles in the examination of the faithfulness of candidates. The resolution requested the Federal

Government to ensure that those principles were respected within its sphere of competence. It also requested the Länder to standardise their procedures on the basis of these principles. The resolution stressed the need to protect the legitimate interests of applicants, particularly in being ensured a fair and verifiable procedure.

196. On 19 May 1976 the Federal Government adopted new principles to be followed in the procedure for verifying the faithfulness of an applicant for employment in the public service, taking into account the Federal Constitutional Court's decision of 22 May 1975 and the above-mentioned Bundestag resolution of 24 October 1975.

197. On 17 January 1979 the Federal Government adopted a new version of the 1976 principles; this came into force for the Federal Administration on 1 April 1979 (Endnote 85) and read as follows:

I

The determination whether an applicant offers the requisite guarantee of faithfulness to the Constitution shall be made by the federal authority competent to take that decision with due regard for the Federal Constitutional Court's decision 2 BvL 13/73 of 22 May 1975 and the principles set forth in the resolution of the German Bundestag of 24 October 1975 and in the light of all the circumstances of the individual case.

II

In determining whether an applicant offers the requisite guarantee of faithfulness to the Constitution for appointment to the public service, the following procedural principles shall be uniformly observed:

1. In deciding whether the authority for protection of the Constitution should be asked for information, the principle of proportionality shall be applied:

1. 1 requests for information should not be made as a matter of routine;

1. 2 a request should be made if there are factual indications that the candidate does not fulfil the requirements for appointment to the public service. Such indications may be obtained in particular during the preparatory service and the period of probation;

1. 3 a request may be made only where an appointment is actually contemplated and faithfulness to the Constitution is the last prerequisite for appointment remaining to be checked;

1. 4 no request shall be made if the applicant is under 18 years of age.

2. For the purposes of communication from the authority for protection of the Constitution in response to requests from the appointing authorities of the Federation, the following principles shall be observed:

2. 1 only judicially admissible facts which may warrant doubts as to a candidate's faithfulness to the Constitution may be communicated to the authorities entitled to request information;

2. 2 information in the possession of the authorities for protection of the Constitution which relates to activities before the eighteenth birthday of the person concerned may not be communicated unless they are the subject of pending criminal proceedings;

2. 3 information concerning activities concluded more than two years previously may not be communicated unless communication is required in view of the special importance of the information according to the principle of proportionality;

2. 4 information subject to a statutory obligation of secrecy may not be communicated.

3. The highest federal authorities shall, in their sphere of activity, ensure that any judicially admissible facts which may be

communicated by the authority for protection of the Constitution are examined for relevance by a central authority which they shall designate.

4. The appointing authorities of the Federation shall be bound to communicate in writing any reservations with regard to the appointment of an applicant and the relevant facts.

5. The applicant shall be entitled to express himself thereon orally or in writing.

6. If a hearing is held, a record shall be kept. The applicant shall be allowed to consult it on request.

7. The applicant shall be allowed the assistance of a legal adviser if he so requests. Such assistance shall be limited to advising the applicant and to questions of procedure.

8. In cases in which the applicant's suitability cannot be established, the decision shall rest with the highest service authority, i.e., in principle the Federal Minister.

9. Rejections may be based only on judicially admissible facts.

10. The grounds for rejection, accompanied by the facts on which they are based, shall be communicated to the applicant in writing, at least if he so requests. The communication shall include information on the right of appeal.

11. Facts which may not be communicated by the authorities for protection of the Constitution to the appointing authority (clauses 2.2, 2.3 and 2.4) may not be used by that authority if they are communicated to it from another quarter.

12. If an appointment is made despite the existence of facts known to the authorities for protection of the Constitution, all documents submitted from the sphere of those authorities shall be removed from the personnel files.

III

The guide-lines for security checks on persons employed by the Federation shall remain unaffected.

198. Certain Länder also amended their guide-lines, according to the same principles as the Federation (Berlin, Bremen, Hamburg, Hessen, North Rhine-Westphalia, Saarland). Rhineland-Palatinate, after making limited modifications in 1979, issued a new version in December 1985, which incorporated the principles concerning the duty of faithfulness enunciated by the Federal Constitutional Court in 1975, but did not change the substance of the earlier guide-lines.

199. On 26 March 1982 the then Minister of the Interior introduced a bill to amend section 77 of the Federal Civil Service Act and section 45 of the Civil Service (General Principles) Act for the Länder concerning disciplinary offences in relation to the duty of faithfulness to the Constitution; its purpose was to ensure that actual conduct and the nature of the functions exercised be taken into account in determining whether conduct outside the service constituted a disciplinary offence. Section 77 of the Federal Civil Service Act was to be amended by the addition of the following sentences:

A breach of the duties incumbent upon an official under section 52(2) of the Federal Civil Service Act shall constitute a disciplinary offence if, in the individual case, a minimum of weight and evidence of breach of duty is established. In determining whether conduct outside the service constitutes a disciplinary offence in relation to the duties incumbent upon the official under section 52(2), the nature and extent of the behaviour, and the functions assigned to the official shall be taken into account. A disciplinary offence shall be deemed to have been committed if conduct outside the service cannot be accepted even with due regard to the official's fundamental rights, in particular the right to freedom of expression. (Endnote 86)

200. This bill was withdrawn in October 1982 after the change in the Federal Government.

201. In June 1985 the Government of the Saarland cancelled the 1979 guide-lines for verification of faithfulness to the Constitution. In this connection it published the following text:

The Saarland Government has cancelled the 1979 guide-lines for verification of faithfulness to the Constitution in the public service.

This decision is based on the following principles and considerations:

1. It is a traditional principle, and one to be respected, of service as an official anchored in the Basic Law for the Federal Republic of Germany that the official has a special duty of political faithfulness to the State and its Constitution. Therefore, also under the provisions of the Saarland Civil Service Act, no one may become an official unless he offers a guarantee that he will at all times uphold the free democratic basic order. The same applies under the German Judges Act to appointment to a judgeship.

The Saarland Government confirms this legal situation. In its view, what really matters is that an official should, in performing his duties, uphold the Constitution with conviction. The official confirms his faithfulness to the Constitution, not by professions of faith and outlook, but primarily by the manner in which he discharges his duties.

2. In a democratic State in which all state authority emanates from the people (Article 20, paragraph (2), first sentence, of the Basic Law), the citizen is entitled to expect that the organs of the State should manifest confidence in him. Hence the authorities have no cause and also no democratic legitimacy to put in doubt the faithfulness of citizens to the Constitution in the absence of indications of activity directed against the Constitution. For that reason an applicant for a post as an official or as a judge need neither declare nor prove that he is ready at all times to uphold the free democratic basic order.

3. By cancelling the guide-lines for verification of faithfulness to the Constitution in the public service, the Saarland Government is making a contribution to greater tolerance in political debate and thus to more democracy in our country. This is more in keeping with the spirit of our Constitution than checks on states of mind which - as the Federal Constitutional Court has stated - "poison the political atmosphere", "irritate not only those concerned in their confidence in democracy" and "discredit the free State".

4. In addition, the new Saarland Government considers it necessary to cancel the "Guide-lines for verification of faithfulness to the Constitution in the public service" for the following reasons:

(a) The guide-lines are based on the Radicals Decree of 1972, whose implementation created in the Federal Republic a climate of fear of a witch-hunt that is detrimental to a living process of democratic opinion-forming and willforming. The implementation of the Radicals Decree was dubious from the legal standpoint and foolish from the political standpoint. It was liable "to darken the luminosity in the Federal German constitutional order through witch-hunting" (Helmut Simon, judge of the Federal Constitutional Court).

(b) The practice of the Radicals Decree has damaged the international prestige of the Federal Republic of Germany.

For example, the European Commission of Human Rights has objected to the Radicals Decree as a loyalty check on servants of the State which is "not necessary for a democratic society" and is disproportionate, and the International Labour Organisation (ILO) - an organisation of the United Nations system - has made the practice of the Radicals Decree the subject of an inquiry.

5. That the implementation of the Radicals Decree has been a bureaucratic wrong tack, with lamentable side-effects, is also clear from the fact that in the Saarland, in the guide-lines that applied here, the formation of a commission to verify faithfulness to the Constitution, its composition and its functions are described at length and take up many pages; in fact the Commission has acted only once since 1972 and the previous routine examination involving a request for information from the authority for protection of the Constitution in no case led to the rejection of an applicant.

Thus, the cancellation of the guide-lines for verification of faithfulness to the Constitution in the public service also makes a contribution to de-bureaucratisation.

202. In 1986, the following guide-lines were applicable at the federal and Land levels:

At the federal level: verification principles of 1979.

At the Land level:

- Baden-Württemberg: guide-lines of 15 October 1973;
- Bavaria: guide-lines of 18 April 1972 and 27 March 1973;
- Berlin: guide-lines of 24 July 1979;
- Bremen: guide-lines of 14 March 1977 and 7 February 1983;
- Hamburg: guide-lines of 13 February 1979;
- Hessen: guide-lines of 9 July 1979;
- Lower Saxony: guide-lines of 20 July 1977 (with annexes);
- North Rhine-Westphalia: guide-lines of 28 January 1980;
- Rhineland-Palatinate: guide-lines of 12 December 1985;
- Saarland: guide-lines cancelled in June 1985 (see above);
- Schleswig-Holstein: (Text not obtained.)

203. In some Länder requests for information on applicants for the civil service are systematically and routinely addressed to the authority for protection of the Constitution. These routine requests (Regelanfragen) are made in Baden-Württemberg and Bavaria; in Lower Saxony for higher officials (including teachers) and officials of certain services, e.g., the police, when the applicant has already been selected; and in the Rhineland-Palatinate when the applicant reaches the short list. In other Länder such a request is made only when the appointing authority knows facts which may warrant doubts as to an applicant's faithfulness to the Constitution, an appointment is actually contemplated, and faithfulness to the Constitution is the last prerequisite remaining to be checked (Berlin, Bremen, Hamburg, Hessen, North Rhine-Westphalia).

204. In several Länder an applicant for the civil service is invited to make a declaration to the effect, inter alia, that he is prepared to bear witness by his entire conduct to his support for the free democratic basic order within the meaning of the Constitution and to act to uphold it, and that he does not support any endeavours hostile to the Constitution or to fundamental principles (Baden-Württemberg, Bavaria, Lower Saxony, Rhineland-Palatinate). In three of these Länder the applicant is required to state that he is not a member of any organisation directed against the Constitution or its fundamental principles (Baden-Württemberg, Bavaria, Rhineland-Palatinate). In other Länder the candidate is not formally bound to make a declaration but is guilty of fraud if he conceals his participation in such attempts (Hessen).

205. In most Länder it is expressly stated that the guide-lines for security checks remain unaffected.

206. Situation with regard to preparatory service (Vorbereitungsdienst). A period of preparatory service in the public service is a prerequisite for admission to certain professions, especially for teachers and lawyers. Their training does not end until the preparatory service has been completed. They are required to perform this service even if they do not intend to work in the public service later on.

207. The Federal Constitutional Court, in its decision of 22 May 1975, stated:

It is open to the State to require the successful completion of a period of preparatory service as a prerequisite both for State service as an official and for an independent profession, and generally to organise it in such a way that the service may be performed in an employment relationship under civil law or in a special relationship under public law other than the relationship of an official. If it opts for a preparatory service which must be performed under a relationship of official, then for

those who contemplate a profession outside state service it must either offer an equivalent, non-discriminatory preparatory service which can be performed without appointment as an official or include in its civil service regulations provision for an exception allowing the preparatory service to be performed, if desired, outside a relationship of official.

208. The guide-lines for verification of faithfulness to the Constitution in certain Länder (Hessen, North Rhine-Westphalia) provide that requests for information shall not be addressed to the authority for protection of the Constitution in the case of candidates for a preparatory service which is required for the practice of a profession that is also carried on outside the public service, such as teacher training or legal training. A similar exception is to be found in Lower Saxony.

209. Some Länder have admitted candidates to preparatory service as salaried employees to enable them to complete their training with a view to the practice of a profession outside the public service.

210. In Bavaria, under section 5, subsection 1(1) of the Bavarian Act on Teacher Training, as amended by an Act of 25 May 1985, preparatory service for teacher training may be completed only in the status of an official. An applicant for preparatory service must fulfil the prerequisites for appointment as an official and must therefore satisfy the authorities that he will at all times uphold the free democratic basic order. Similar requirements also exist in Baden-Württemberg. On 2 October 1986 the Federal Labour Court ruled that Baden-Württemberg was nevertheless obliged to provide an opportunity to all persons seeking qualification as a teacher to perform the requisite preparatory service, even if doubts existed as to their faithfulness to the Constitution. Cases concerning the corresponding problem in Bavaria are pending before the same Court.

211. Situation of salaried employees and wage earners. Under collective agreements, persons employed in the public service under a contract of employment are also subject to an obligation of faithfulness to the Constitution.

212. Thus clause 8, subclause 1(2) of the Federal Collective Agreement for Salaried Employees - which applies to salaried employees of the Länder and local authorities as well as to those of the Federation - provides that a salaried employee "shall bear witness by his entire conduct to his support for the free democratic basic order within the meaning of the Basic Law". Similar provisions appear in the collective agreements for wage earners employed by the Federation, the Länder and local authorities and in those for salaried employees and wage earners of the Federal Postal Service and the Federal Railways.

213. Decisions of the courts. A number of judicial decisions concerning the duty of faithfulness to the free democratic constitutional order for officials and applicants for appointment to the civil service, as well as some decisions concerning the duty of faithfulness for salaried employees and wage earners, constitute important elements for appreciation of the practice followed in the Federal Republic in applying the duty of faithfulness to the Constitution.

214. The Federal Constitutional Court, in a leading decision of 22 May 1975 commonly referred to as the "Radicals Decision" (Radikalenbeschluss), (Endnote 87) spelt out its interpretation of the concept of faithfulness to the free democratic basic order for officials and applicants for appointment to the civil service.

215. According to the Court, a feature of the history of the German civil service since the end of the eighteenth century has been the special obligation laid upon officials in the form of a duty of faithfulness. In the course of time, there developed out of that duty a number of specific duties such as those prescribed in the Civil Service Acts. The Constitution maintains this duty of faithfulness as a traditional principle of the civil service. The nucleus of the duty of faithfulness is the duty of political faithfulness: that is to say, readiness to identify oneself with the idea of the State which the official is to serve, with the free democratic basic order of that State. The official's duty of political faithfulness to the State and its Constitution thus constitutes a traditional principle of service as an official within the meaning of Article 33, paragraph 5, of the Constitution. This duty requires of the official adherence to the state order and constitutional order in force and in particular requires him to dissociate himself clearly from groups that attack, combat or defame the State, its constitutional organs and the constitutional order. A party which in its programmes advocates the dictatorship of the proletariat or approves the use of force to overthrow the constitutional order, if circumstances permit, is pursuing aims hostile to the Constitution. The traditional duty of faithfulness gains especial significance from the fact that the Constitution institutes a "militant democracy". This fundamental notion of the Constitution precludes a situation in which the State admits to, and keeps in, its service officials who reject and combat the free democratic basic order.

216. The Court stated that a breach of the duty of faithfulness justifies in principle the dismissal of an official on probation or a revocable official and may lead, after (judicial) disciplinary proceedings, to the removal from office of an official for life.

217. With regard to access to the civil service, the Court considered that Article 33, paragraph 5, of the Constitution and statute law make it a prerequisite for admission to the civil service that the applicant should satisfy the authorities that he will at all times uphold the free democratic basic order. The conviction that an applicant does not satisfy this condition is to be based on an evaluation of his personality, which includes a forecast and depends on many factors which vary from case to case and on the assessment of those factors. One such factor which may be of importance in evaluating the applicant's personality may be his joining or belonging to a political party that pursues aims hostile to the Constitution, regardless of whether that party has been found unconstitutional by judgement of the Federal Constitutional Court, in accordance with the special procedure prescribed in Article 21, paragraph 2, of the Constitution, or not.

218. The Court held that the legal principles deriving from Article 33, paragraph 5, apply to the relationship of every official, whether he be a revocable official, an official on probation or an official for life. Those principles allow of no differentiation according to the nature of the official's functions.

219. The Court further concluded that, since the duty of faithfulness to the free democratic basic order has constitutional force under Article 33, paragraph 5, of the Constitution, it limits the fundamental rights guaranteed in the Constitution, in particular freedom from discrimination by reason of political opinions (Article 3, paragraph 3) and freedom of opinion (Article 5), and does not conflict with Article 12 concerning in particular free choice of occupation.

220. The Court stated that a similar obligation of faithfulness rests upon salaried employees in the public service, although the requirements are less stringent for them than for officials.

221. The courts in the Federal Republic of Germany have held, by reference to the programme adopted by the DKP (German Communist Party), that the party's aims are hostile to the Constitution, taking the general view that the DKP attacks, combats and defames the existing free democratic basic order, and they have drawn conclusions from this with regard to the faithfulness to be expected of applicants for appointment to the civil service and of officials.

222. According to the Federal Administrative Court, (Endnote 88) the DKP combats essential elements of the free democratic basic order and aspires to an order of society differently structured and to a corresponding body politic; the DKP rejects the fundamental principles of a free democracy based on law (as evidenced by its own statements, the objectives of the Mannheim programme adopted on 20-22 October 1978 and earlier statements). In the Court's view, the conclusion to be drawn from these declarations is that the DKP is the successor to the KPD (Communist Party of Germany), which was banned by the Federal Constitutional Court in 1956; for example, the DKP professes its attachment to Marxism-Leninism, a mode of action which, according to earlier usage, was to lead to the "socialist revolution" and the "dictatorship of the proletariat" and which now pursues the same goals under different names. According to the Court, the profession of support for the democratic principles of the Constitution which appears in the preamble to the Party's programme is in irreversible opposition to that party's aims.

223. The DKP - according to the Court - not only attacks and combats the constitutional order but also defames it. In this connection the Court mentioned in particular that the party had described the existing economic order as one of "capitalist exploitation". In the Court's opinion, special significance attached to the campaign conducted against the so-called "Berufsverbote" (job bans) which the Court considered to be aimed at discrediting the Federal Republic at home and abroad. It considered "the repeated and irritating indication that in other Western countries communists were not kept out of the State service" to be defamation of the Federal Republic and its organs. In a decision of 21 December 1983 (Eckartsberg case), (Endnote 89) the Administrative Court of Hanover referred to the fact that the DKP emphasised negative manifestations in the life of the Federal Republic, such as unemployment and income disparities, without mentioning the great increase in the standard of living in recent years, the free choice enjoyed by individuals as regards training, occupation, way of life and use of their income, the opportunities enjoyed also by workers to build up capital, the influence which freely constituted trade unions can exert, the opportunities to express politically opposed views, and free elections of legislative bodies. The same court also attached significance to the aims of the DKP with regard to the central control of credit as creating extensive means of exerting influence on private undertakings which continued to exist, observing that Article 15 of the Constitution (which authorises the

nationalisation of land, natural resources and means of production) did not provide for the socialisation of credit. Although this judgement was reversed on appeal by the Disciplinary Court of Lower Saxony, the latter court confirmed that there had been an objective breach of the duty of faithfulness, merely considering that in the particular circumstances there was no subjective guilt. (Endnote 90)

224. The Federal Administrative Court has given two important decisions with regard to the faithfulness of officials to the Constitution, dated 29 October 1981 (Peter case) (Endnote 91) and 10 May 1984 (Meister case). (Endnote 92) These cases related to officials who had worked in the Post Office Telecommunication Service for more than 25 years. The Court emphasised that the duty of faithfulness to the free democratic basic order was binding on an official in all his conduct, outside the service as well as in the performance of his functions. That duty bound every official without distinction as to the nature of his functions. The Court held that irreproachable conduct in the service was not enough. In both cases its finding that the official had violated his duty of faithfulness was based on the official's political activities outside the service. The Court considered that membership of the DKP might or might not, according to the facts of the case, constitute sufficient evidence of a breach of the duty of political faithfulness, although not a necessary element of such a breach. However, active participation by an official in the DKP or on its behalf (in particular by holding office in the party or standing as a DKP candidate in local, regional or federal elections) would be evidence of identification with aims hostile to the Constitution and hence of a breach of the duty of faithfulness.

225. Having held the aims of the DKP to be hostile to the Constitution, the Court considered it to be irrelevant that the official concerned and the party itself had declared that they had no intention of changing the State order by violence, and that the official had declared that the free democratic basic order formed the basis of his understanding of the Constitution and that he was prepared to uphold it. A person who declared his adherence to a party having aims hostile to the Constitution thereby also declared himself in favour of those aims and against the Constitution.

226. In the Meister case, the Federal Administrative Court accordingly reversed the decision given at first instance by the Federal Disciplinary Court, which had accepted the official's statements as relevant. The Federal Disciplinary Court had taken the view that, so long as the official's aims remained consistent with the Constitution and the official expressly and unequivocally upheld the State and the Constitution, he could not be compelled to dissociate himself from a party which was not prohibited.

227. The judgements in the Peter and Meister cases establish the case law of the Federal Administrative Court. They have had a direct influence on the policy and administrative practice of the authorities in respect of disciplinary proceedings against officials active for the DKP and other parties or organisations regarded as pursuing aims hostile to the Constitution. They have also provided a decisive basis for judgements in many cases confirming or ordering the exclusion of officials from the civil service.

228. In this connection mention may be made of several decisions which show the effects of this case law. Thus in a judgement of 26 June 1985 concerning a teacher who was an official for life (Eckartsberg case), the Disciplinary Court of Lower Saxony (Endnote 93) concluded that, through his active participation and his standing as a DKP candidate in the 1981 local authority elections, the official had violated his duty of faithfulness. The Court, however, annulled his dismissal on subjective grounds, considering that there had been no culpable violation of that duty owing to the legal uncertainties resulting from the attitude of the Land authorities employing him and in view of the official's statement that he would examine the Court's judgement and take it into account if the DKP should invite him again to stand for election.

229. Following that decision, the Government of Lower Saxony published a circular drawing the attention of all officials to two judgements of the Court of Lower Saxony (including the above-mentioned judgement in the Eckartsberg case) concerning the duty of faithfulness to the free democratic basic order. The circular drew particular attention to the Court's statement that standing for election on behalf of the DKP constituted by itself a breach of the duty of political faithfulness and that, in such a case, the employer was bound to institute disciplinary inquiries.

230. The Administrative Court of Neustadt-Weinstrasse, Rhineland-Palatinate, in a judgement of 26 February 1986 concerning a teacher who was an official for life (the Jung case), (Endnote 94) held that, by his active participation in the DKP before 1984, when he had held various functions in the DKP, the official had supported a party whose aims were hostile to the

Constitution and had thereby violated his duty of political faithfulness and committed a disciplinary offence. The Court found, however, that throughout his 25 years of service the official's conduct had not been reflected in any way in the professional field and that neither in his teaching nor in his contacts with his pupils, parents, colleagues or superiors had he conducted himself as an active member of the DKP. He had at no time, in his teaching, tried to influence the children along communist policy lines, and there was no danger that he would do so in the future. His professional performance was good; he was on good terms with pupils, parents and teachers; he had been a member of the school staff council for ten years; and outside school he had distinguished himself in the vocational training field. Although the Court held that the official had not expressly dissociated himself from the DKP and hence had not respected the duty of political faithfulness, it considered that he had probably not committed any disciplinary offence for the past two years and that there was accordingly no reason to order his dismissal. The Court ordered a 15 per cent reduction in salary for a period of three years so that the official would not resume his pre-1984 activities; it stated that a resumption of activities for the DKP of the kind mentioned in the judgement would be likely to result in removal from the service.

231. Among judicial decisions concerning the official's duty of faithfulness to the free democratic basic order, mention should be made of the divergent attitude taken by the Federal Disciplinary Court - which is competent to rule at first instance in disciplinary cases concerning federal officials - in the Peter and Meister cases and more recently in those of other postal officials (Bastian, Brück, Elsinger and Repp cases).

232. On 26 June 1985 the Federal Disciplinary Court (Endnote 95) gave judgement in favour of a postal worker who had been an official for life since 1977 (Repp case), on the grounds that the official had not committed a disciplinary offence by reason of his membership of the DKP and his activities on behalf of that party. The Court observed that in earlier times, particularly during the Weimar Republic, the duty of faithfulness had been defined in a relatively strict manner, so that only misuse of an official's functions or conduct aimed at changing the existing order by violent or illegal methods was prohibited. The Court considered that the situation in the Weimar Republic could serve to clarify the effect of the Federal Constitutional Court's decision of 1975. It accordingly concluded that an official did not commit a disciplinary offence by support for a party which was not prohibited or by activities for such a party, including membership, holding of party office and standing for election on behalf of the party.

233. With regard to persons working in the public service under a contract of employment, it should be noted that the Federal Constitutional Court, in its decision of 22 May 1975, stated: "Although salaried employees in the public service are subject to less stringent requirements than officials, they nevertheless owe their employer loyalty and conscientious performance of their service functions; they too may not attack the State in whose service they are, or its constitutional order; they too may be dismissed without notice for gross violation of those service obligations; and they too may be refused employment if there is reason to think that they will be unable or unwilling to discharge the duties connected therewith."

234. The Federal Labour Court has held that the requirement of faithfulness should be differentiated according to the nature of the duties attached to the post when an applicant for employment in the public service is to work under a contract of employment and not with the status of official. The requirements to be met by an applicant for work as a salaried employee derive solely from Article 33, paragraph 2, of the Constitution. To deduce from the duty of faithfulness embodied in the collective agreements a uniform duty of political faithfulness, divorced from their functions, for all members of the public service would be to place unnecessary and disproportionate limitations on the fundamental political rights of salaried employees, freedom of opinion and freedom of political activity in a party. (Endnote 96)

235. Thus with regard to the duty of faithfulness required of an applicant for admission to preparatory service as a teacher, the Court has noted that he need not satisfy the authorities that he will at all times uphold the free democratic basic order; it is enough if he takes what may be regarded as a neutral attitude to the State and the Constitution and is not expected to question, in his teaching, the fundamental values of the Constitution. (Endnote 97) Active membership of the DKP and the MSB-Spartakus is not enough in itself to justify serious doubts as to the candidate's faithfulness. (Endnote 98)

236. With regard to the dismissal of a salaried employee from the public service, the Court observed in a judgement of 6 June 1984 that political activity by a salaried employee in the public service (in the specific case, standing as a DKP candidate in local authority elections) in principle constitutes a ground for ordinary dismissal of the individual concerned only if, having regard to

the authority's tasks, the employee cannot be considered suitable for the functions he has to perform in connection with his work. Dismissal on grounds of conduct presupposes that political activities outside the service specifically impair the employment relationship. (Endnote 99)

CHAPTER 6

THE ALLEGATIONS SUBMITTED AND RELATED DOCUMENTATION

Allegations made by the WFTU

237. In its representation of 13 June 1984 the World Federation of Trade Unions alleged 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). The WFTU considered that the non-observance by the Federal Republic of Germany of its obligations was the result of discriminatory practices currently applied, for political reasons, to public servants, and to applicants for employment in the public service.

238. The WFTU recalled that the Governing Body of the ILO, at its 211th Session in November 1979, had discussed an earlier representation submitted by the WFTU on the same matter, and had declared the closure of the procedure on the basis of the report of 15 June 1979 of the Committee appointed to examine the representation. (Endnote 100) The WFTU alleged that since that time the Government of the Federal Republic of Germany had not made serious efforts to bring either legislation or practice into conformity with the Convention.

239. In support of its claim, the WFTU referred to the observations concerning the application of Convention No. 111 in the Federal Republic of Germany made by the Committee of Experts on the Application of Conventions and Recommendations in its report to the Conference in 1983. (Endnote 101) Despite these observations, the Government of the Federal Republic of Germany had continued to misinterpret Article 1, paragraph 2 of Convention No. 111 (inherent requirements of a particular job) and Article 4 (activities prejudicial to the security of the State) to justify its discriminatory practices, which were in contradiction with the Convention.

240. The WFTU alleged that since 1979 there had been several hundred cases of discriminatory measures taken to the detriment of applicants for employment in the public service or public servants. Between autumn 1983 and February 1984 there had been new disciplinary court decisions in 12 cases and new disciplinary measures in 17 cases.

241. The WFTU stated that the discriminatory practices had been condemned by the workers concerned as well as by trade union congresses in the Federal Republic of Germany. It transmitted resolutions adopted by recent congresses of the Deutsche Postgewerkschaft, IG Metall, IG Druck und Papier, and the Gewerkschaft Erziehung und Wissenschaft.

Information and documentation provided by the WFTU

242. In its representation and the appended documents the WFTU named 79 persons stated to have been affected by discriminatory measures and supplied details concerning their cases. Most of them were officials holding lifetime appointments; others were officials on probation or performing preparatory service, applicants for public service employment or salaried employees. Twenty-four cases concerned the Federal Post Office; five, other federal services; 41, the teaching profession. Among the remaining nine cases, two concerned church employees. The measurees said to have been taken against a number of these persons ranged from dismissal, threat of dismissal, denial of employment, transfer and threat of transfer to denial of promotion. In other cases, reference was made to disciplinary proceedings, the threat of a disciplinary inquiry, or a security interview.

243. According to the information supplied, the grounds for the measures taken were most commonly membership in the German Communist Party (Deutsche Kommunistische Partei (DKP)) and activities for this party, such as standing as a candidate in parliamentary or local elections; in some cases the grounds were participation in the activities of other organisations or in public demonstrations or the signing of public appeals.

244. With its representation, the WFTU supplied documentation relating to a number of the cases mentioned by it, including official communications, court judgements and documents analysing and describing disciplinary proceedings. In particular, it communicated a detailed analysis of the judgement of the Federal Administrative Court of 29 October 1981 ordering the dismissal from the Federal Post Office of a telecommunications technician, Hans Peter. (Endnote 102) In response to the invitation addressed to it by the Commission to present further information and observations, the WFTU communicated an analysis of current case law, (Endnote 103) and referred to a debate in the Federal Diet (Bundestag) in January 1986 (Endnote 104) as well as to the reports of the Committee on the Application of Conventions and Recommendations of the International Labour Conference, 1981, 1982 and 1983. (Endnote 105)

245. As noted in Chapter 2, the WFTU presented six witnesses at the Commission's second session, four of whom were persons who had been affected by measures taken in application of the provisions relating to the duty of faithfulness to the free democratic basic order, whereas the two other were legal experts. In the course of the hearings of witnesses, the WFTU transmitted a number of further documents, including a publication by the Deutsche Postgewerkschaft (Endnote 106) and information on measures affecting employment in the public service in Baden-Württemberg. (Endnote 107)

246. At the end of June 1986, the WFTU presented further comments, referring to the observations submitted to the Commission by the Government of the Federal Republic of Germany, to which it appended a document commenting on the replies given by the Government to questions in the Federal Diet (Endnote 108) and extracts from a series of legal writings. At the same time, the WFTU also submitted additional documentation on individual cases. In its comments, the WFTU observed that in all the cases submitted to the Commission the measures taken by the Government of the Federal Republic or Länder Governments had been determined only by the political opinions of the individuals affected. The WFTU's communication contained detailed comments on a number of issues: the special situation of the Federal Republic and the lessons to be learnt from the Weimar Republic; the doctrine of totalitarianism; the illegality of occupational bans under the constitutional law of the Federal Republic; the distortion of the concept of the free democratic basic order; the interpretation of the provisions of Convention No. 111; the exhaustion of local remedies; measures to ensure the security of the State and the allegation of espionage; the "liberality" of the practice of occupational bans in the Federal Republic in comparison with practices in other countries.

247. The WFTU agreed with the assertion by the Government in its communication of March 1986 that a body of officials of inherently democratic convictions constituted a guarantee of a free democracy. However, the WFTU considered that such a democratic conviction could not be achieved by depriving public servants of their political rights and denying them the right to share the opinion of a radical but legal opposition party or to commit themselves to organisations and movements that the Government of the Federal Republic considered "hostile to the Constitution".

248. The WFTU observed that the Weimar Republic had not collapsed because it lacked sufficient measures to protect the Constitution or because it had not imposed occupational bans. The authority to ban political organisations had frequently been used. Towards the end of the Weimar Republic this authority and especially political penal law had, however, been directed almost exclusively against organisations on the political left. There had also been occupational bans in the Weimar Republic. The decrees adopted by the social-democratic governments of Prussia and Hamburg, under which membership of the NSDAP or the KPD were considered to be a violation of an official's duty of faithfulness, had not reduced the NSDAP's influence in the civil service. Hardly any officials belonging to that party were dismissed; on the other hand, especially after the prohibition on NSDAP membership was lifted in 1932, many higher ranking officials who were members of the SPD were replaced by persons with a "national" attitude. The few KPD members had already been dismissed. The occupational bans towards the end of the Weimar Republic paved the way for the purge following the seizure of power by the fascists in 1933. Precisely the "lessons of history" spoke against the practice of occupational bans.

249. The WFTU stated that the identification, in accordance with the theory of totalitarianism, of fascism with communism was practised with particular persistence in the Federal Republic so as to discriminate against communists. That theory had no basis in the Federal Republic's Constitution. Indeed, communists had participated in the parliamentary council set up by the occupying powers to elaborate the draft Constitution for the Federal Republic. By contrast, hardly any theme of the Constitution was as strong as the rejection of a fascist political order. Consequently, there were no constitutional grounds for an identification of fascists with socialists or communists.

250. The WFTU observed that the Government's assertion that those affected by occupational bans intended to eliminate human rights and the free democratic basic order had not been substantiated by the Commission's hearings. Even the government witnesses had stated that the alleged human rights violations consisted solely in the individuals concerned not being willing to distance themselves from their outlook and political convictions. The Government based its allegation not on the deeds of the individuals concerned, but on its contention that the party to which they belonged or with which they sympathised intended to do away with the free democratic basic order. However, there was no decision of the Federal Constitutional Court (the only body competent in the matter under the Federal Republic's Constitution) declaring the DKP's aims to be incompatible with the free democratic basic order. In respect of the public service, the Government acted as if the Federal Constitutional Court had prohibited the DKP in accordance with Article 21, paragraph 2, of the Basic Law. Before 1972 the view generally expressed in authoritative legal publications was that such a practice would be contrary to the Constitution. That view had also been taken by the Federal Administrative Court in a decision of 14 March 1973 concerning a soldier. The Court had held that measures taken on the ground of his membership of and activities for a party that had not been banned by the Federal Constitutional Court violated Article 3, paragraph 3 (non-discrimination) and Article 5, paragraph 1 (freedom of expression) of the Basic Law, as well as the "privilege for political parties" under Article 21, paragraph 2, of the Basic Law. The former Court had stated that until a party had been banned no one could claim, to the disadvantage of a public servant, that the party was contrary to the Constitution, that it did not act to uphold the existing democratic State Constitution, or that membership of and activities for it were incompatible with a commitment to the free democratic basic order. That was a decision in favour of an officer who was a member of the NPD. Just two years later, on 6 February 1975, another chamber of the same Federal Administrative Court took the diametrically opposed position: the rejection of an applicant teacher on account of her membership of the DKP was found to be in accordance with the law. Shortly afterwards the Federal Constitutional Court, in its leading decision of 22 May 1975, ruled that membership of a party that was not banned but hostile to the Constitution was a part of the conduct to be taken into account by an employing authority in verifying an applicant's faithfulness to the Constitution. The WFTU observed that, although the Basic Law did not provide for a status between prohibition of a party under Article 21, paragraph 2, of the Basic Law and protection of its freedom of action, the Federal Constitutional Court had created a grey area with its concept of "hostility to the Constitution" as a result of which the party concerned, its members and supporters were largely removed from constitutionally-guaranteed freedoms.

251. The WFTU asserted that even the assumption that public servants had to be more faithful to the Constitution than other citizens could not transform activities in conformity with the Constitution into illegal activities hostile to the Constitution, or give employing administrations a competence that was not theirs under the Constitution, namely, that of judging the constitutionality of political parties. It appeared contradictory to regard as a violation of faithfulness to the Constitution the exercise by officials of basic rights protected by the same Constitution. Moreover, the Government had not produced a single statement from a DKP programme to substantiate its allegation that the party intended to abolish the free democratic basic order.

252. The WFTU observed that, in accordance with the rules for the interpretation of international treaties set down in the Vienna Convention on the Law of Treaties (Articles 31 and 32), Convention No. 111 should be interpreted, first, in accordance with the terms of the Convention itself. Article 1, paragraph 1, of the Convention contained a precise legal definition of discrimination. Of importance for the precise determination of the contents of the Convention were those bodies that, on the basis of the ILO Constitution, considered the interpretation of Conventions; in this case particularly the Committee of Experts on the Application of Conventions and Recommendations, in accordance with article 22 of the ILO Constitution, and Committees set up to deal with representations under article 24 of the Constitution. These organs did not impinge on state sovereignty. An interpretation of Convention No. 111 on the basis of undefined concepts in other international treaties, which would have the consequence of ruling out in the state sector a differentiation according to specific jobs, would, moreover, be inadmissible "in the light of the object and purpose" of the Convention (Vienna Convention, Article 31, paragraph 1). Furthermore, when the Federal Republic ratified the Convention in 1961, neither prevailing legal opinion nor administrative or judicial practice disputed that membership of a political party could not be a ground for exclusion from the public service unless the party concerned had been declared unconstitutional under Article 21, paragraph 2, of the Basic Law or the right of the individual concerned had been forfeited under Article 18 of the Basic Law. In the year the Convention was ratified the Federal Constitutional Court had given the decision that confirmed that domestic legal situation (BVerfGE 12, p. 296 ff.). The distinction between "hostile to the Constitution" and "contrary to the Constitution", which had been made before the KPD was banned in 1956, was expressly invalidated. The distinction reappeared in legal theory and court case law only after the decree on radicals

was adopted in 1972. It was therefore to be presumed that the Federal Republic had based its ratification of Convention No. 111 on an understanding of its terms that was in accordance with the present interpretation of the Convention by the ILO's supervisory bodies.

253. The WFTU observed that the Government considered membership of the DKP and activities for that party, including standing as candidate in elections for public office, as an attack on the security of the State. However, it had not been able to explain in any concrete case in what manner the activities of persons excluded from the public service constituted a threat to the security of the State. In addition the Government had constructed the theory of a threat to security in times of crisis. It attributed that risk equally to anyone employed as a teacher or a customs official, or in the postal or railways service, if his ideas came close or could come close to those of the DKP. The legal opinion of Professor Doebling went a step further and accused the DKP of espionage for a foreign power. The WFTU vigorously rejected, as defamatory and discriminatory, the suspicion that members of the DKP who earned their living in the public service were spies and constituted a threat to the security of the State.

254. Referring to two comparative studies published in the Federal Republic (Doebling et al: *Verfassungstreue im öffentlichen Dienst europäischer Staaten*, Berlin, 1980; Böckenförde, Tomuschat, Umbach: *Extremisten und öffentlicher Dienst: Baden-Baden*, 1981) the WFTU stated that, contrary to their interpretation by Professor Doebling, the country studies clearly showed that the administrative and judicial measures developed in the Federal Republic discriminating against applicant officials on the basis of their political opinions found hardly any counterpart in the countries surveyed. In his comparative analysis Professor Tomuschat had concluded that in the countries examined, in so far as the duty of faithfulness to the constitutional order existed at all, it was conceived functionally and related to the post; the Federal Republic, with its general duty of faithfulness, departed significantly from this Western European common denominator. The WFTU added that the judicial protection provided in the Federal Republic was of little value to the individuals concerned as the higher administrative courts approved the practice of occupational bans.

255. As regards the Government's contention that local remedies had not been exhausted, the WFTU observed that the procedures provided for in the ILO Constitution - contrary to the European Convention of Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights - did not require the exhaustion of local remedies. Consequently, the rule did not apply in this procedure. Even if it did apply it would have to be regarded as having been fulfilled. For one thing, there was the decision of the Federal Constitutional Court of 22 May 1975; for another, that Court had given its basic approval to the Federal Administrative Court's case-law on occupational bans (Bundesverfassungsgericht, NJW 1981, p. 2683).

Information and documentation received from other sources

256. Indications have been given in Chapter 2 of the decisions taken by the Commission to seek information from various sources other than the WFTU and the Government concerned and also to take into consideration communications received from individuals and organisations in the Federal Republic of Germany. Consequently, it has had at its disposal a large volume of information, mostly giving particulars of individual cases arising from the application of the provisions relating to the duty of faithfulness to the free democratic basic order. Such information has come directly from the persons affected or their legal representatives, from trade union organisations representing various categories of public servants (particularly postal workers and teachers), and from a number of non-governmental organisations campaigning against "Berufsverbote".

257. The Commission received a communication from Dr. Siemantel, a lawyer acting on behalf of the DKP. The letter observes that even the Federal Government does not claim that the DKP advocates the use of violent methods, and points out that the party programme makes clear that the party's ultimate aim of establishing a socialist society in the Federal Republic is not to be attained by means of putsch or plot but, on the contrary, expressly rejects such a course. The communication adds that, in both its objectives and its action, the DKP respects also those elements of the basic order which, under Article 79, paragraph 3, of the Constitution, are not open to amendment.

258. The information received in respect of individual cases frequently includes relevant documentation, such as notifications of dismissals or suspensions, complaints and other pleadings filed in judicial proceedings, and court judgements. There are statements made by official bodies, such as Land parliaments or municipal councils, trade unions or staff councils,

representatives of political parties, parents' councils and other citizen groups, as well as press articles. There are also publications issued by trade unions or non-governmental organisations documenting individual cases or groups of cases. (Endnote 109) The "Bürgerinitiative gegen Berufsverbote", Freiburg, communicated, on the basis of computerised records, brief descriptions of approximately 600 cases of persons affected in their employment or occupation by measures taken on account of their political affiliations or activities. Many of these cases had occurred in the 1970s; however, in some 250 instances, measures had either been initiated or been the subject of further action by the executive or judicial authorities since 1979, the year of adoption of the revised guide-lines for verification of faithfulness to the Constitution of applicants for federal employment.

259. During the testimony of the witness representing the authorities of Bavaria, the representative of the WFTU sought information on two individuals stated to have been refused employment in the Bavarian public service. Detailed information concerning these cases was subsequently communicated by the Government of the Federal Republic of Germany. As mentioned in Chapter 2, the Commission also decided to take into consideration the public documents available in respect of two cases pending before the European Court of Human Rights. (Endnote 110)

Analytical summary of documented cases

260. An analysis of data provided to the Commission from various sources in the course of its inquiry regarding the number of persons affected in their employment or occupation by measures related to their political affiliations or activities will be found in Chapter 9.

261. Presented below is a table giving brief indications of 73 cases for which the Commission has received documented information from the different sources previously mentioned, followed by a summary of the facts of 15 selected cases (which, in the table, are identified by an asterisk). Account has been taken of information received up to the time of the Commission's third session, in November 1986.

262. In approximately three-fifths of the cases mentioned in this table, the disciplinary proceedings or other measures concerned were initiated in the years from 1982 onwards.

263. All the cases mentioned in the table involve the issue of fulfilment of the duty of faithfulness to the free democratic basic order and arise out of activity within, affiliation or association with a party or organisation the aims of which have been considered hostile to the Constitution. Most cases involve membership and activity in the German Communist Party (DKP). Isolated cases involve association with other Communist organisations, namely, the Kommunistischer Bund Westdeutschlands and the Bund Westdeutscher Kommunisten. (Endnote 111) Several cases concern persons active in student organisations within the social democratic political spectrum. (Endnote 112) One case arose out of activity in the Association of Democratic Lawyers, considered a Communist-influenced organisation. (Endnote 113) Other cases arose out of activity in the German Peace Union (Endnote 114) or organisations of conscientious objectors to military service. (Endnote 115) Two of the cases in the table concern persons active in the National Democratic Party of Germany (NPD). (Endnote 116)

264. In some cases the persons concerned have denied the activities alleged to prove their association with the party or organisation in question. In others the measures taken have been based on refusal to answer questions about membership of the DKP.

265. The grounds for the measures taken. The central allegation made against persons who have been refused admission to the public service or whom it was proposed to dismiss from the public service on the ground of deficient faithfulness to the basic order has been that of identifying themselves, directly or indirectly, with a party whose objectives are considered to be hostile to the Constitution. Within that framework, a wide range of actions or omissions have been regarded as evidencing a violation of the duty of faithfulness or, in the case of applicants, failure to guarantee that they would at all times uphold the free democratic order. For example, as regards association with the DKP - which is at issue in the majority of the documented cases brought to the attention of the Commission - the allegations range over the following matters: suspected activities in or for the DKP and refusal to answer questions about them and to dissociate oneself from the party; activities for an organisation said to be connected or influenced by the DKP; past activities, as a student, for an organisation influenced by the DKP; membership of the

DKP; association in party activities such as attendance at meetings of the DKP, speaking at such meetings, writing articles for party publications, distributing party publications, soliciting funds for the party, or applying for permission for a party information stand in a public place; holding office in the DKP; standing as a DKP candidate at elections; being a DKP member of a municipal council. In any given case there is usually a combination of such allegations.

266. In its decision of May 1975, the Federal Constitutional Court stated that officials must unequivocally distance themselves from groups and endeavours which combated, attacked and defamed the State, its constitutional organs and the existing constitutional order. The Court also ruled that the fact of joining or belonging to a party which had aims hostile to the Constitution might constitute one of the elements taken into account in judging whether an applicant for the public service would at all times uphold the free democratic basic order. In the legal opinion by Professor Doebling submitted to the Commission by the Federal Government, it is observed that, if an applicant for a post in the public service states that, knowing the basic principles of the DKP, he intends to maintain this political affiliation, the rejection of his application would appear justified. Asked to comment on this statement when giving evidence before the Commission, the Federal Disciplinary Prosecutor observed that membership in a party such as the DKP, which expected special activity from its members, also when they were public officials, could have a decisive significance in considering whether to engage an applicant. (Endnote 117) He also indicated that the Federal Administrative Court had left open the question whether mere membership by an official in a party having aims hostile to the Constitution might constitute a violation of the duty of faithfulness. (Endnote 118) The witness representing the authorities of Baden-Württemberg stated that in all cases which had arisen in that Land, whether of refusal of applicants or dismissal, there had been activities beyond mere membership, so that there had been no occasion for deciding whether mere membership of a party with aims hostile to the Constitution was incompatible with the duty of faithfulness. (Endnote 119) The witness representing the authorities of Bavaria stated that mere membership in the DKP or NPD did not constitute a sufficient ground for refusing an applicant or for dismissal, but that in every case there must be facts which showed that the person concerned actively supported endeavours against the constitutional order; this requirement was established by the case-law of the courts. (Endnote 120) The witness representing the authorities of Lower Saxony stated that membership of a party hostile to the Constitution was considered as an indication pointing to the need for further inquiry. If an applicant admitted such membership, he was asked whether he wished to support the party's aims and adopt them as his own. (Endnote 121) The authorities of Lower Saxony indicated to the Commission, during its visit to the Federal Republic, that an applicant who cut himself loose from the aims of such an organisation could be accepted; on the other hand, if he held on to them, he could not. The report of the Office for the Protection of the Constitution of Rhineland-Palatinate for 1985 indicates the factors borne in mind in determining whether membership in a party with objectives hostile to the Constitution justifies the conclusion that an applicant for employment in the public service fails to guarantee faithfulness to the Constitution; they include voluntarily joining the party, failure to distance oneself from the party's constitutionally hostile objectives, and maintaining membership. (Endnote 122)

267. For example, Reinhilde Engel, a teacher employed in Baden-Württemberg as an official on probation since 1972, was dismissed in June 1981 on the ground of alleged membership of the DKP at least from 1973 to 1975 and because she declined to answer questions concerning her present relationship to the party and to dissociate herself from its aims. The Administrative Court, Karlsruhe, annulled the dismissal in December 1984, holding that inactive membership by an official in a lawful party did not violate the duty of faithfulness. The Land Government has appealed against that decision. In the case of Gesa Groeneveld, a social worker employed as a salaried employee at Esslingen, Baden-Württemberg, the employing authority, in a statement issued to the press in March 1986, indicated that it would have been prepared to discontinue proceedings for dismissal if Mrs. Groeneveld had declared her willingness to give up her membership of the DKP and activities for the DKP. In a series of letters addressed to the teachers' union (GEW) between March 1983 and May 1985 with reference to disciplinary proceedings against lifetime officials working as teachers in Rhineland-Palatinate, the chairman of the district administration of Rheinhessen-Pfalz stated that membership of the DKP or the NPD was contrary to the duty of officials to uphold the free democratic basic order. Astrid Weber was refused employment as a teacher in Rhineland-Palatinate in 1983 because she had not given an unambiguous reply to the question concerning present membership of the DKP; the letter of refusal stated that, according to several judgements given by the Federal Administrative Court in 1982, in such circumstances the requisite conviction of the applicant's future faithfulness to the Constitution could not be gained. In the cases of Thomas Bürger and Rainald Könings, officials on probation working as teachers in Schleswig-Holstein, measures for dismissal have been based upon suspected membership of the DKP and refusal to answer questions concerning such membership or to dissociate themselves from that party.

268. Some of the cases brought to the attention of the Commission involve requirements of a statement of attitude towards a party of which the person concerned was not a member. For example, the judgement of the Bavarian Administrative Court in the case of Gerhard Bitterwolf (November 1985) indicates that a series of questions put to him to determine his fitness for appointment required him to comment on aspects of the aims and programme of the DKP, to which he did not belong.

269. The nature of the measures taken. In most of the documented cases before the Commission the measure the administration has applied or is seeking to apply is the exclusion of the person concerned from the public service. This has taken the form of disciplinary proceedings against officials for life; the dismissal of revocable officials, officials on probation, and salaried employees; refusals to admit qualified applicants to the public service; refusals of admission to the preparatory training service. Other cases have involved reduction in pay, reduction in pension, transfers for security reasons and refusal to allow contractual employees to become officials. The general application of the policy has led to very many inquiries, investigations, and interrogations.

270. Basing themselves largely on what is considered established case-law resulting from the judgements of the Federal Administrative Court in the Peter and Meister cases, some administrations have suspended officials for life with a reduction in pay or dismissed other categories of officials or salaried employees pending the conclusion of judicial proceedings.

271. The information available shows that in 1984 the Federal Post Office gave Herbert Bastian, Wolfgang Repp and Gustav Steffen the choice of immediately distancing themselves from the DKP or being suspended from their jobs pending the conclusion of the judicial proceedings against them. They refused to put an end to their DKP activities and were consequently suspended with a reduction in pay. Also the Post Office officials Axel Brück, Berthold Goergens and Egon Momberger, as well as the customs official Uwe Scheer, have been suspended; the railways official, Ulrich Eigenfeld, was suspended before his definitive removal from the service. The Federal Post Office did not lift the suspensions of Bastian, Brück, Goergens and Repp after the Federal Disciplinary Court had found in their favour on the substance of their cases, because the Federal Disciplinary Prosecutor appealed to the Federal Administrative Court against these judgements, which therefore did not take effect. (Endnote 123)

272. Suspensions of officials subject to disciplinary proceedings have also occurred at the level of the Länder. For example, in July 1986 the Lower Saxony authorities suspended Irmelin Schachtschneider and Dorothea Vogt with a 50 per cent reduction in pay; in August 1986 they suspended Karl-Otto Eckartsberg.

273. Incidental effects of exclusion from the public service. Communications received from a number of the individuals concerned referred to the indirect effects that exclusion from the public service has had or was likely to have on their employment and occupation. They stated that they had not been or probably would not be able to find another job in the occupation for which they had been trained. If they found a job at all, it was, or was likely to be in another occupation and with a much lower grade than the one held previously.

274. Witnesses appearing before the Commission stated that the reason that had led to the exclusion of persons from employment in the public service would tend to stand in the way of their finding employment in the private sector. Private employers would be reluctant to employ someone dismissed from or not admitted to the public service on the ground that he was held to be hostile to the Constitution. (Endnote 124) Employers in security-sensitive areas might have even more stringent political requirements than the public service. (Endnote 125) As regards the prospects of excluded teachers, witnesses noted that there were, in any case, few private schools. (Endnote 126) The current level of unemployment limited further the prospects of finding alternative employment. (Endnote 127)

Employer Employment Nature and result of

Name status decisions and proceedings

I: FEDERAL SERVICE

Federal Post Office

*Herbert Bastian Official for life Disciplinary proceedings;

(postal clerk) judgement in official's

favour by Federal

Disciplinary Court.

Prosecutor's appeal

pending before Federal

Administrative Court.

Heinz-Jürgen Salaried employee Refusal of appointment as

Brammer official.

Axel Brück Official for life Disciplinary proceedings;

(telecommunications judgement in official's

technician) favour by Federal

Disciplinary Court.

Prosecutor's appeal

pending before Federal

Administrative Court.

Karl Elsinger Official for life Disciplinary proceedings;

(postal inspector) judgement in official's

favour by Federal

Disciplinary Court.

Prosecutor's appeal

pending before Federal

Administrative Court.

Hans-Joachim Salaried employee Refusal of appointment as

Gerhus official.

Berthold Goergens Official for life Disciplinary proceedings;

(telecommunications judgement in official's

technician) favour by Federal

Disciplinary Court.

Prosecutor's appeal

pending before Federal

Administrative Court.

Günter Hütter Official for life Disciplinary proceedings

(telecommunications initiated.

technician)

*Hans Meister Official for life Disciplinary proceedings;

(telecommunications dismissal ordered by

technician) Federal Administrative

Court.

Volker Metzroth Wage earner Transfer for security

(telecommunications reasons to other, less

craftsman) qualified job; appeal

against immediate entry

into effect upheld by

Labour Court.

Egon Momberger Official on Investigations initiated.

probation

(telecommunications

technician)

*Hans Peter Official for life Disciplinary proceedings;

(telecommunications dismissal ordered by

technician) Federal Administrative

Court.

Peter Pipiorke (telecommunications To be transferred for

craftsman) security reasons.

*Wolfgang Repp Official for life Disciplinary proceedings;

(postman) judgement in official's

favour by Federal

Disciplinary Court.

Prosecutor's appeal

pending before Federal

Administrative Court.

Werner Siebler Official on Complaint against

probation (postman) dismissal pending before

Administrative Court.

Gustav Steffen Official for life Disciplinary proceedings

(postman) initiated in Federal

Disciplinary Court.

Helmut Wörz Wage earner Transfer for security

(telecommunications reasons to other, less

craftsman) qualified job.

Federal Financial Administration

*Uwe Scheer Official for life Disciplinary proceedings

(customs official) initiated in Federal

Disciplinary Court.

Federal Railways

*Ulrich Eigenfeld Official for life Disciplinary proceedings;

(railways clerk) dismissal ordered by Fe-

deral Disciplinary Court

and upheld by Federal

Administrative Court.

Constitutional complaint

not admitted by Federal

Constitutional Court.

Joachim Mende Official for life Investigations concluded.

(railways clerk) Disciplinary proceedings

expected.

Federal Social Security Institute for Salaried Employees

Edith Official on Dismissal upheld by Land

Wiese-Liebert probation Administrative Court. Re-

(superintendent) refusal of leave to appeal

confirmed by Federal

Administrative Court.

II: SERVICE IN LANDER

BADEN-WURTEMBERG

Teachers

Sigrid - Claim to be engaged as

Altherr-König contractual employee

rejected by Land Labour

Court.

Christa Aspiron Revocable official Revocation of appointment

(preparatory upheld by Administrative

service) Court. Appeals pending.

Reinhilde Engel Official on Complaint against dis-

probation dismissal upheld by Adminis-

trative Court. Government

appeal pending before

Land Administrative

Court.

*Gerlinde Official on Complaint against

Fronemann probation upheld by Federal

Administrative Court. New

proceedings under

consideration.

Julika Haibt - Complaint against refusal

of admission to

preparatory service as

contractual employee

upheld by Federal Labour

Court.

Rolf Kosiek Official on Dismissal upheld by Land

probation Administrative Court.

Appeal dismissed by

Federal Administrative

Court. Constitutional

complaint not admitted by

Federal Constitutional

Court. European Court of

Human Rights held that

there had been no

interference with a right

protected under the

European Convention of

Human Rights.

*Klaus Lipps Official on Complaints against

probation dismissal upheld by Land

Administrative Court.

Government's complaint

against refusal of leave

to appeal rejected by

Federal Administrative

Court.

Hans Schaefer Official on Dismissal upheld by Land

probation Administrative Court. Re-

fusal of leave to appeal

confirmed by Federal

Administrative Court.

Martin Zeiss Official on Complaint against

probation dismissal pending before

Administrative Court.

Judicial service

Gerd Wernthaler Official on Appointment as official

probation for life after delay due

to investigations.

Social worker

Gesa Groeneveld Salaried employee Judgement of Land Labour

Court upholding complaint

against dismissal quashed

by Federal Labour Court,

and case referred back to

Land Labour Court.

BAVARIA

Teachers

*Gerhard - Refusal of appointment as

Bitterwolf official on probation,

after completion of

preparatory service,

upheld by Land

Administrative Court. Re-

fusal of leave to appeal

confirmed by Federal

Administrative Court.

Hans Heinrich - Complaint against refusal

Häaberlein of admission to prepara-

tory service upheld by

Land Administrative

Court. Applicant

subsequently appointed

official on probation and

then official for life.

Alfred Karl - Judgement of Land Labour

Court upholding refusal

of appointment as univer-

sity assistant quashed by

Federal Labour Court. New

judgement of Land Labour

Court pending.

Manfred Lehner - Complaint against refusal

of admission to prepa-

ratory service upheld

by Land Administrative

Court. Applicant

subsequently admitted and

later appointed official

on probation.

Friedrich - Refusal of admission to

Sendlesbeck preparatory service as

contractual employee

upheld by Land Labour

Court. Appeal to Federal

Labour Court pending.

Judicial service

Beate Büttner Salaried employee Refusal of admission to

(legal trainee) legal training as

revocable official upheld

by Administrative Court.

Cornelia Lindner Salaried employee Refusal of admission to

(legal trainee) legal training as

revocable official upheld

by Administrative Court.

*Charlotte - Refusal of appointment

Niess-Macheas judge on probation, after

completion of preparatory

service, upheld by Land

Administrative Court.

Thomas Rosenland Salaried employee Refusal of admission to

(legal trainee) legal training as

revocable official upheld

by Administrative Court.

Maria Wittgen Salaried employee Refusal of admission to

(legal trainee) legal training as

revocable official upheld

by Administrative Court.

HESEN

Teachers

Mario Berger - Refusal of appointment as

official on probation,

after completion of

preparatory service,

upheld by Land

Administrative Court.

Engaged as contractual

employee after change of

Land Government's policy

in 1984.

Angelika Wahl - Refusal of appointment as

official on probation in

1975. Refusal of engage-

ment as salaried employee

after change Land

Government's policy in

1984 (based on level of

qualifications) upheld by

Labour Court. Appeal

pending before Land

Labour Court.

LOWER SAXONY

Teachers

*Karl-Otto Official for life Disciplinary proceedings;

Eckartsberg judgement in official's

favour by Land

Administrative Court. New

disciplinary proceedings

initiated.

Heike Flessner Official for life Disciplinary proceedings

initiated in

Administrative Court.

Alies Klüver Official for life Dismissal ordered by

Administrative Court.

Appeal to Land

Administrative Court

pending. Warning of new

disciplinary proceedings.

Heinze-Udo Lammers Salaried employee Dismissal without notice

and subsequent dismissal

with notice annulled by

Labour Courts. Government

appeal pending before

Federal Labour Court. New

notification of

dismissal.

Helga Lange Official for life Disciplinary proceedings

initiated.

Ulrich Lepa Official on Dismissal.

probation

Ulrike Marks Official for life Disciplinary proceedings

initiated in

Administrative Court.

Hans-Joachim Official on Disciplinary proceedings;

Müller probation judgement in official's

favour by Federal Admi-

nistrative Court. New no-

tification of dismissal.

Heiko Pannemann Official for life Disciplinary proceedings;

judgement in official's

favour by Administrative

Court.

Udo Paulus Official for life Dismissal ordered by

Administrative Court.

Proceedings before Land

Administrative Court

terminated by agreement

between the parties.

Irmelin Official for life Disciplinary proceedings

Schachtschneider initiated in

Administrative Court.

*Matthias Official for life Disciplinary proceedings

Schachtschneider initiated in

Administrative Court.

Rolf Schön Salaried employee Dismissal without notice

and subsequent dismissal

with notice annulled by

Labour Court. Government

appeal pending before

Land Labour Court. New

notification of

dismissal.

Thomas Official for life Disciplinary proceedings;

Schultze-Kranert judgement in official's

favour by Administrative

Court.

Dorothea Vogt Official for life Disciplinary proceedings

initiated in

Administrative Court.

Thomas Weber - Engagement in university

faculty of chemistry as

contractual employee

halted pending

investigations.

Elisabeth Welvers - Refusal of employment.

Matthias Wietzer - Refusal of appointment as

official on probation

upheld by Administrative

Court; appeal pending.

Refusal of appointment as

contractual employee

upheld by Land Labour

Court.

University administration

Helga Wilhelmer Official for life Disciplinary proceedings

initiated in

Administrative Court.

NORTH RHINE-WESTPHALIA

Teacher

Julia Glasenapp Official on Revocation of appointment

probation in 1975 upheld by Land

Administrative Court.

Constitutional complaint

not admitted by Federal

Constitutional Court.

European Court of Human

Rights held that there

had been no interference

with a right protected

under the European Con-

vention of Human Rights.

RHINELAND-PALATINATE

Teachers

Evelyn Barthel Official for life Disciplinary proceedings

initiated.

Elke Burkart Official for life Disciplinary proceedings

initiated.

Ulrich Foltz Official on Dismissal upheld by

probation Administrative Court.

*Wolfgang Jung Official for life Disciplinary proceedings;

15 per cent reduction in

earnings for three years

ordered by Administrative

Court.

*Maria Lachmann Official for life Disciplinary proceedings

initiated.

Rüdiger Quaer Official on Dismissal upheld by

probation Federal Administrative

Court. Constitutional

complaint not admitted by

Federal Constitutional

Court. Complaint pending

before European Commis-

sion of Human Rights.

Walter Schmitt-Mix Official for life Investigations initiated.

Astrid Weber - Refusal of appointment as

official on probation.

SCHLESWIG-HOLSTEIN

Teachers

*Thomas Bürger Official on Disciplinary proceedings

probation pending before

Administrative Court.

Rainald Könings Official on Notification of

probation dismissal.

Case descriptions

Federal level

275. Herbert Bastian. Bastian was engaged by the Federal Post Office in 1960, when he was 14 years old. In 1971 he was appointed official for life. He has been promoted three times. He worked in the mail sorting division of the Marburg Post Office. Bastian joined the DKP in 1973. Since 1974 he has been a member of Marburg municipal council as a DKP representative. Bastian is also a member of the Deutsche Postgewerkschaft (DPG), and was the DPG representative in the Marburg mail sorting division.

276. A performance appraisal made in August 1979 described Bastian's performance as "fully satisfactory"; his conduct in the service was free from reproach, and nothing unfavourable was known outside the service. Bastian stated that his activity in the Marburg city council had always been marked by an active commitment to the democratic and social principles of the Basic Law, the Constitution of Hessen, and the constitutional order in general. He had seen his elective office as a mandate to act to improve the conditions of life of the population. In accordance with the relevant legal provisions, the Federal Post Office had always given him time off to attend the council's sessions. (Endnote 128)

277. In 1979 the Post Office initiated investigations into his membership of and activities for the DKP, especially his

membership of the Marburg municipal council as a DKP representative. So as to put an end to the disciplinary proceedings, the Federal Ministry for Posts and Telecommunications in 1981 offered to keep Bastian on as a wage earner if he requested his discharge from the status of official. In evidence before the Commission Bastian stated that the offer had been made by the SPD-FDP government in response to growing criticism at home and abroad; he had refused it because he did not wish, by requesting his discharge from the status of official, to accept a practice of political persecution and discrimination or to be an accomplice of those who annulled constitutional rights and freedoms. (Endnote 129)

278. When questioned in August 1982, Bastian was asked for his opinion on the judgement of the Federal Administrative Court of 1981 in the Peter case. He stated that he did not consider himself to be bound by the judgement, especially as it had been criticised by a number of jurists. (Endnote 130) In 1983 the Federal Minister for Posts and Telecommunications initiated disciplinary proceedings against him in the Federal Disciplinary Court.

279. On the grounds that he expected the courts to order Bastian's dismissal, the Federal Minister for Posts and Telecommunications suspended him at the end of September 1984 with a 20 per cent reduction in pay. When informed in August 1984 of the Ministry's intention to suspend him, he was again asked whether, in view of the settled case law of the Federal Administrative Court - the Peter judgement (1981) and the Meister judgement (1984) - he was willing to dissociate himself from the DKP and to give up all his activities for that party, including his municipal council mandate for the DKP.

280. In November 1984 the Federal Disciplinary Court ordered the cessation of the proceedings because of procedural defects in consulting the staff council. In December 1984 the Federal Disciplinary Court also annulled Bastian's suspension. However, that decision did not take effect, as the Federal Disciplinary Prosecutor appealed against it. Both decisions of the Federal Disciplinary Court were reversed by the Federal Administrative Court in February 1985; it ordered the Federal Disciplinary Court to deal with the substance of the case.

281. In a judgement of 20 October 1986, the Federal Disciplinary Court held that Bastian had not violated the duty of faithfulness by his membership of and activities for the DKP. (Endnote 131) It found, however, that Bastian had violated his duty of restraint and respect by a newspaper article impugning the objectivity and independence of the Federal Administrative Court, and imposed a 5 per cent reduction in pay for six months. The Federal Disciplinary Prosecutor has appealed against the first of these decisions to the Federal Administrative Court.

282. In his evidence before the Commission, Bastian observed that the training he had received was specific to the Post Office; it would not qualify him for skilled work elsewhere. If he were dismissed from the service - and that was the aim of the proceedings against him - he would have to do casual or unskilled work. In effect, there would be an occupational ban against him. (Endnote 132)

283. In his decision to suspend Bastian, the Federal Minister for Posts and Telecommunications stated that neither the vast majority of the officials of the Federal Post Office nor public opinion would understand why an official charged with serious breaches of duty that could be expected to lead to his dismissal should remain in the service. Bastian told the Commission that the response of his colleagues and the concern shown by the public had shown the contrary to be true. With a view to supporting him in the proceedings before the Federal Disciplinary Court, some 1,240 persons had signed a full-page statement in the local paper, and the Marburg-Biedenkopf branch of the DGB had organised a solidarity meeting for him, in which some 500 trade unionists had taken part. (Endnote 133) The Mayor of Marburg wrote to the Minister for Posts and Telecommunications in March 1983 and again in August 1984. In the former letter, he requested the Minister to abandon the proceedings against Bastian, for legal, personal and political reasons. While stressing that he himself was opposed to the DKP, he said he found it unjustifiable that membership of the municipal council should be held against Bastian, whose attitude in the council had in no way been hostile to the Constitution. One had to consider also that Bastian had for 24 years had an irreproachable record of service, and that as a postal clerk he would not be in a position to threaten seriously the free democratic basic order of the Federal Republic. In the second letter, the mayor asked the Minister not to suspend Bastian. He observed that the mere exercise by Bastian of his rights of freedom of association and expression, without engaging in activities that were hostile to the Constitution, should not be the subject of disciplinary proceedings. The mayor also referred to the local authority regulations of Hessen, according to which no one should suffer prejudice at his workplace as a result of exercising an elective mandate. On both occasions, the Minister replied that he could not accede to the mayor's request, since Bastian had committed

a serious breach of duty.

284. In October 1984 the Hessen Diet adopted a motion criticising the Federal Minister's decision to suspend Bastian (as well as Axel Brück and Wolfgang Repp) and demanding the withdrawal of the decision. In October 1985 the Marburg municipal council adopted a motion protesting against Bastian's suspension and the disciplinary proceedings against him.

285. Ulrich Eigenfeld. Eigenfeld was appointed a clerk in the Federal Railways in May 1971, and official for life in August 1974. In 1978 he was refused a promotion, as he was suspected of continually violating his duty by standing as a candidate for and holding office in the NPD.

286. According to appraisals referred to in the judgement of the Federal Administrative Court, Eigenfeld's performance in his service had always been favourably assessed; he had sometimes received the grade of "very good".

287. By its judgement of 26 April 1984 the Federal Disciplinary Court ordered Eigenfeld's dismissal on the grounds that he had violated his duty of political faithfulness: he had been a member of the NPD since 1969; he had held various offices in the party, including the deputy chairmanship of the Lower Saxony NPD and membership of the NPD's federal committee; he had stood as a NPD candidate in local, Land and federal elections; as the director of the NPD's department for relations and planning, he was currently in charge of redrafting the NPD's programme. The court stated that the NPD, which Eigenfeld objectively supported by his activities, was a party that pursued objectives that were incompatible with the Constitution. The party's real intentions could not be inferred from its programme or statutes, but rather from the statements of party supporters, officials and members, of organisations that were close to or connected with the party, as well as from printed material and articles in the official party newspaper, "Deutsche Stimme".

288. Eigenfeld appealed against the judgement of the Federal Disciplinary Court; during the ensuing proceedings he was suspended from his job. In his appeal Eigenfeld argued that, as a member of the party's federal committee, he was in a position to oppose statements and publications that conflicted with the party's intentions and work and that were directed against the free democratic basic order. It was thanks to him and his supporters that certain NPD office-bearers had been expelled for presenting views that had led to the wrong conclusions being drawn about the party's intentions. As a result, the image of the party had changed in the past few years; the Federal Disciplinary Court had not taken this into account.

289. In its judgement of 12 March 1986 the Federal Administrative Court rejected Eigenfeld's appeal. The duty of political faithfulness, stated the Court, applied to an official's conduct outside his service as well as in his service. That Eigenfeld's political opinions had had no effect on the way he carried out his duties or on his dealings with colleagues, and that he had stated that he was committed to the Constitution were not considered to be relevant. The court stated also that, given his public identification with the party, it did not matter whether he supported the NPD's objectives as a whole or only in part. Recent statements made by leading party officials made it clear that the NPD's basic attitude had not changed, despite the repeated changes in the party's leadership and the purported expulsion of certain members. Although it conceded that the NPD's statements had become more moderate, and that, in particular, it had recently refrained from statements inspired by National Socialism, the Court observed that the party had not explicitly dissociated itself from its previously expressed opinions. By his activities in and for the party, Eigenfeld had identified himself with its ideology. An official's duty to distance himself from such a party was not fulfilled if, while working inside the party to turn it away from objectives hostile to the Constitution, he nevertheless publicly supported its programme and policy by accepting candidatures for and positions in it and acted as its representative. At no time had Eigenfeld publicly dissociated himself from those statements by party officials of which he disapproved. Since he refused to put an end to his work in the NPD, he had to be dismissed. That conclusion could not be affected by the fact that the Federal Railways had, during the preliminary investigations, offered to continue to employ him as a contractual employee in the field in which he had worked up till then if he gave up his status of official. The courts could not be bound by the opinion of the employer, which was often guided by considerations of expediency.

290. In view of his long and otherwise irreproachable service, the Court decided to accord him a financial allowance of 75 per cent of his earned pension during six months, which might be prolonged by the Federal Disciplinary Court on proof of inability to find other employment.

291. The Federal Constitutional Court in June 1986 refused to admit Eigenfeld's constitutional complaint on the grounds of insufficient prospect of success.

292. Hans Meister. Meister was engaged by the Federal Post Office in 1959, when he started his apprenticeship. In July 1964 he became a qualified engineer. From 1968 until his dismissal he worked in a telephone exchange in Stuttgart. In July 1970 he was appointed official for life, and in 1974 he was promoted to the position of senior technical telecommunications official. Meister told the Commission that in this position he was among those responsible for organising the work in his branch. (Endnote 134)

293. In an official appraisal referred to in the judgement of the Federal Disciplinary Court, Meister's performance was described as very good and well above average. There were no grounds to believe that he had sought, during his working time, to enlist support for an extremist political party. He was described in the appraisal as one of the most professionally and personally respected officials in the telephone exchange.

294. As from 1970 he was a member of the examinations committee for telecommunications workers during two four-year periods. He had been nominated by the DPG, and sometimes acted as chairman of that committee.

295. Meister joined the DKP in 1970, and has regularly engaged in activities for that party. He was a member of the Baden-Württemberg council of the DKP, and from 1975 onwards was a DKP candidate in various local and national elections and for the office of mayor of Stuttgart.

296. As an active member of the DPG, Meister was the union's representative and group chairman at the telephone exchange.

297. In July 1979 the Federal Minister for Posts and Telecommunications initiated disciplinary proceedings against Meister. In his evidence before the Commission, Meister said that already in 1973 an application he had made for a job had been rejected on political grounds; in 1978 he had been transferred for security reasons. (Endnote 135)

298. In November 1979 the official investigator concluded that the evidence received had not confirmed the complaint. In his evidence before the Commission, Meister stated that, as a result of this conclusion, the Federal Minister for Posts and Telecommunications had informed the Federal Disciplinary Prosecutor that he intended to abandon the proceedings. The Prosecutor, however, opposed this and initiated disciplinary proceedings against Meister in the Federal Disciplinary Court. (Endnote 136) In the Prosecutor's complaint, Meister was accused of having, since 1971, continually violated his duty of faithfulness, by his membership of and activities for an organisation hostile to the Constitution, the DKP.

299. Meister told the Commission that in 1981 the Ministry for Posts and Telecommunications had offered to keep him as a contractual employee if he requested his discharge from his status of official; at the same time, he would have been transferred to a position that was not "security-sensitive". He had refused the offer because he would not have been able to retain a job as an electrical engineer, and because he did not want to recognise the allegations that he was a threat to the Constitution and a security risk. Meister told the Commission that the administration had produced no concrete evidence to show that he was a security risk; he had merely been told that in a crisis he would have to be so regarded. Meister stressed that he had never handled confidential material in his work, which was based on information to which any member of the public could have access. (Endnote 137)

300. The Federal Disciplinary Court, in November 1982, found in Meister's favour. The Court observed that Meister could see no conflict between the free democratic basic order set down in the Constitution and the objectives of the DKP. Nevertheless, he did not want to be judged by the DKP programme, but by his own intentions and convictions. His socio-political objectives were also contained in the programme of his union, the DPG. The Disciplinary Court stated, in accordance with the judgement of the Federal Administrative Court in the Peter case (29 October 1981), that the objectives of the DKP were incompatible with the free democratic basic order. It nevertheless found in Meister's favour because it had not been established that, by his membership of the DKP and by exercising a function in that party and being its elective candidate, he had violated his duty of faithfulness. Meister's membership of a party pursuing objectives hostile to the Constitution did not necessarily

mean that he himself disapproved of and combated the free democratic basic order and intended, from his position as an official, to destroy it. The Court accepted as credible his statement that he did not intend to change the Federal Republic's state structures by force. It also noted that his aims were consistent with those of his trade union, the DPG. The resolution of the conflict between the unambiguous judicial decisions concerning the anti-constitutional objectives of his party and Meister's equally unambiguous statement of support for the Constitution was not a matter for the Court to settle, but a problem for his conscience. The Court considered that Meister could not be reproached for his political activities which went beyond mere membership in the party. In respect of candidacies in elections, the Court observed that, as long as the party in question was not banned, they should - all the more to protect democracy and the free expression of the will of the people - not be impeded.

301. On appeal by the Federal Disciplinary Prosecutor, the Federal Administrative Court on 10 May 1984 reversed the decision and ordered Meister's dismissal. Particulars of this judgement will be found in Chapter 5, paragraph 224.

302. In his evidence before the Commission, Meister observed that in its decision of May 1975 the Federal Constitutional Court had stated that, in judging whether the duty of faithfulness to the free democratic basic order was fulfilled, only the individual case under consideration was to be taken into account, with an evaluation of a series of factors that varied from one case to another. Meister observed that the Federal Disciplinary Court, after evaluating the specific features of his case, had found in his favour. He had been able to explain in detail and reply to the Court's many questions about his political convictions, activities, and political aims. In contrast to the Federal Disciplinary Court, the Federal Administrative Court had shown no interest in his personality, actions, and aims. The court had not asked him a single question about his political activities. No account had been taken of a statement he had made to the Court, of the copies of public speeches he had made, and of the programme he had put forward in the elections for the mayor of Stuttgart. Not he had been in the dock, but his party, the DKP. (Endnote 138)

303. Meister also told the Commission that already when he was heard in October 1979 he had clearly stated that he was committed to the basic principles underlying the free democratic basic order: respect for human rights, sovereignty of the people, separation of powers, accountability of the Government to Parliament, the independence of the courts, the multi-party system and the right to form an opposition. (Endnote 139)

304. In his evidence before the Commission, Prof. Däubler, who had acted for Meister before the Federal Administrative Court, said that the Court had taken no account of Meister's assurances that he supported and would act in conformity with the Constitution. (Endnote 140)

305. Noting his long and otherwise irreproachable service and constantly recognised performance, the Federal Administrative Court granted Meister 75 per cent of his earned pension during six months after his dismissal, a payment which might be prolonged by the Federal Disciplinary Court on proof of inability to find other employment.

306. Meister informed the Commission that since his dismissal in May 1984 he had not been able to find a job in the occupation, for which he had been trained, despite the shortage of electrical engineers on the labour market. His dismissal on political grounds had deterred those who might have employed him. After a long period of unemployment he was trying to support his family by working as an independent journalist. That was very difficult, and brought many problems.

307. During the proceedings against him, Meister received support from workers' representatives and trade unions. The central staff council at the Federal Ministry for Posts and Telecommunications in May 1979 opposed the initiation of the disciplinary proceedings. A resolution adopted by the 14th DPG Congress (1983) stated that the proceedings against Meister before the Federal Administrative Court typified the intensification of the practice of occupational bans (Berufsverbote) and urged the Federal Disciplinary Prosecutor to withdraw his appeal against the judgement of the Federal Disciplinary Court.

308. Hans Peter. Peter was engaged by the Federal Post Office in 1951, and worked at a telephone exchange in Stuttgart. He was appointed official for life in 1959, and promoted chief technical telecommunications secretary in 1971. In an official appraisal referred to in the judgement of the Federal Disciplinary Court, his performance was described as "good to very good"; his effort and conduct were outstanding, and he was one of the most respected officials at the telephone exchange.

309. Peter was an active trade unionist: he held various trade union offices, including membership of the council of the DPG at his place of work.

310. Peter joined the DKP in 1969 and was publicly active for the party. He stood as a candidate for the DKP in elections, was responsible for local newspapers, and was for a few years a member of the council of the DKP, Stuttgart. No comments were made on his activities until 1972, when he was heard by two post office officials. After the hearing, he was informed that the impression was that he acted within the Constitution.

311. Five years after this hearing, the Federal Post Office initiated investigations. Peter was alleged to have violated his duty of the faithfulness to the free democratic basic order by being a member of the DKP; writing articles for and being presented in DKP journals; being a DKP candidate in various local elections; visiting with other DKP members the GDR for political purposes. In April 1978 Peter was questioned by the investigator, a director of the Post Office, who concluded that there was no evidence of concrete activities hostile to the Constitution. Also the central staff council at the Federal Ministry for Posts and Telecommunications was of the opinion that Peter had not committed a breach of duty. Nevertheless, at the end of 1978 Peter was transferred for security reasons to a job in the postal order section, and in January 1979 the Federal Disciplinary Prosecutor initiated disciplinary proceedings in the Federal Disciplinary Court.

312. In March 1980 the Federal Disciplinary Court found in Peter's favour. The Court held that the DKP's objectives were incompatible with the free democratic basic order. On the other hand, it stated that DKP membership fell within the scope of "having a conviction and declaring it", which was protected by the decision of the Federal Constitutional Court of 22 May 1975. The Court considered that editing a DKP journal, holding office in the party, and being a DKP candidate in elections were evidence of an objective breach of duty, but that Peter's activities for the DKP did not constitute a culpable breach of duty as provided in section 77(1)(1) of the Federal Civil Service Act, mainly because his supervisors had not been able to inform him unequivocally whether those activities would have disciplinary consequences; in the Federal Post Office the legal situation was considered to be uncertain. The burden of this legal uncertainty should not fall on Peter.

313. On 29 October 1981 the Federal Administrative Court reversed the decision. It held that Peter had constantly violated his duty of faithfulness to the State and to the Constitution and ordered his dismissal. The Court observed that the application of a less severe sanction would have no effect on Peter, since he intended to continue his activities. His otherwise irreproachable conduct could not affect the Court's judgement.

314. The Federal Administrative Court did not grant any temporary financial allowance to Peter, as his wife had an income greater than the highest possible allowance that could have been granted. Further particulars of this judgement will be found in Chapter 5, paragraph 224.

315. In its comments to the Commission, the DPG observed that the only reason for Peter's dismissal was that he was an active member of the DKP; neither in nor outside his service had he engaged in activities that were hostile to the Constitution.

316. Wolfgang Repp. Repp is a postman in Frankfurt/Main, Hessen. He has been in the service of the Federal Post Office since 1965. He was promoted to the rank of senior postal clerk in 1972, and was appointed an official for life in 1977.

317. In a decision of the Federal Disciplinary Court in 1984 Repp's performance was described as "good"; it was also stated that he had not engaged in political activities in service. In March 1982 the Post Office management, Frankfurt/Main, appointed him member of an examinations committee. Repp is an active member of the DPG and of the staff council of Post Office 1, Frankfurt/Main.

318. Repp was first questioned in April 1975 about his membership in the DKP and his DKP candidacies in local elections in 1972 and 1974. In June 1976 he was informed that the Federal Ministry for Posts and Telecommunications had concluded that, because of his activities for the DKP and its front organisations, he could not expect to be appointed official for life in 1977; he would be dismissed if by that time he was unable to dispel doubts about his faithfulness to the Constitution. Nevertheless, after protests by colleagues and members of the public, he was appointed official for life in June 1977.

319. In June 1978 the Federal Post Office suggested that, to avoid disciplinary proceedings, Repp give up his functions in and activities for the DKP. He refused to dissociate himself from the DKP. Preliminary investigations were initiated against Repp in June 1979 for suspected breach of the duty of faithfulness on the grounds of membership of the DKP, activity in that party since 1972, unwillingness, despite advice, to give up these activities, standing as a candidate for the DKP in the 1978 elections to the Land Diet, and membership of the committee of the Hessen branch of the DKP.

320. In 1981 Repp was informed that, if he requested discharge from his status of official, the Federal Ministry for Posts and Telecommunications would be willing to employ him as a wage earner. He refused this offer, saying that to accept it would be to disregard his own constitutional rights. In May 1982, he was asked whether, after learning of the Federal Administrative Court's decision of 29 October 1981 (Peter judgement), he was willing to put an end to his activities for the DKP.

321. In 1983 the Federal Minister for Posts and Telecommunications initiated proceedings against Repp in the Federal Disciplinary Court. In March 1984 that court rejected the complaint, on the ground that Repp's appointment as official for life despite his DKP activities had been a "deliberate, definitive and unconditional decision" of the Federal Ministry for Posts and Telecommunications and, as such, a decision to refrain from dismissing him. In July 1984 the Federal Administrative Court quashed that decision: it ruled that the complaint against Repp was admissible and must be heard by the Federal Disciplinary Court.

322. In September 1984 the Federal Minister for Posts and Telecommunications decided to suspend Repp, with a 25 per cent reduction in pay. In November 1984 the Federal Disciplinary Court annulled that decision for procedural reasons. The Post Office did not allow him to resume work, because the Federal Disciplinary Prosecutor appealed against the Court's decision. The Federal Disciplinary Court in December 1984 ordered the Post Office to allow him to resume work, pending the Federal Administrative Court's decision on the appeal. In January 1985 the Federal Administrative Court reversed that Court's decision, so confirming Repp's suspension and pay reduction.

323. On the substance of the case, the Federal Disciplinary Court decided in Repp's favour in June 1985 on the ground that his membership in and activities for the DKP did not constitute a disciplinary offence. Further particulars of this judgement will be found in Chapter 5, paragraph 232. The Federal Disciplinary Prosecutor has appealed against this judgement.

324. Protests concerning the Repp case began in 1976. They were directed against the Ministry's intention not to appoint him official for life, and included the collection of 10,000 signatures with, among them, those of the President of the DGB, H.O. Vetter, and the Chairman of the DPG in Hessen. In August 1978 the committee of the Frankfurt branch of the DPG wrote to the Chairman of the SPD group in the Federal Diet. It said it disapproved of the action taken by the Federal Minister for Posts and Telecommunications and hoped that the SPD group, which supported the Government, would help to keep Repp in his occupation. In October 1984 the conference of the Hessen branch of the DPG protested against the suspension of several postal officials, including Repp; it called for cancellation of these suspensions and abandonment of disciplinary proceedings. In October 1984, the Hessen Diet adopted a motion criticising the Federal Ministry's decision to suspend Repp (as well as Herbert Bastian and Axel Brück) and demanding the withdrawal of the decision.

325. Uwe Scheer. Since 1963 Scheer has been employed in the clerical service of the Federal Financial Administration. In November 1967 he was appointed official for life. In July 1971 he was promoted to the grade of senior customs secretary. He has worked in Hamburg, first in border clearance, then as a clearance official at an inland customs house, and finally in the accounts department. In the latest (1983) official appraisal, Scheer's performance was described as excellent; he was worthy of further promotion.

326. In 1965 Scheer became a workplace representative of the Gewerkschaft Öffentliche Dienste, Transport und Verkehr (OTV), and was until 1978 a member of the committee of the OTV's department for the Federal Financial Administration. He was elected member of the staff councils at his workplaces and of the district staff council at the Federal Financial Administration, Hamburg.

327. In May 1983 the Federal Financial Administration informed Scheer that investigations had been initiated concerning his candidacies on the DKP list in Hamburg-Wandsbek council elections in 1978 and 1982. He was requested to dissociate himself

from the DKP. Disciplinary proceedings were initiated in August 1983. The district staff council, on which the Deutscher Beamtenbund (DBB) has a majority, approved the initiation of these proceedings, on condition that Scheer should not be suspended or have his pay reduced. In February 1985 the Federal Disciplinary Prosecutor initiated proceedings in the Federal Disciplinary Court, charging Scheer with having continuously violated his duty of political faithfulness through his membership and activities for a party hostile to the Constitution, the DKP; the allegations were his candidacies for the DKP and his presumed membership of that party. Scheer has refused to say whether he is a member of the DKP, arguing that such questions are out of order. By April 1986 a date for the hearing of the case before the Court had not yet been set.

328. In May 1985 the Federal Financial Administration suspended Scheer, reduced his pay by 20 per cent, and cancelled his vacation pay, his "thirteenth" month bonus, and his progression to a higher seniority step. According to Scheer, these measures reduced his annual income by DM 7,000 in 1985. The staff council protested against Scheer's suspension; it was, however, upheld by the Federal Disciplinary Court.

329. In a communication submitted to the Commission, Scheer observed that his candidacies for the DKP had been announced in the official gazette. At the time no authority or superior told him that such conduct was inadmissible. Action was taken only five years after the first, and a year after the second and third candidacies. He considered that exercising the right to be elected could not be a breach of duty.

330. The OTV is providing Scheer with legal assistance. Among persons and organisations supporting him are the Hamburg branches of the Gewerkschaft Erziehung und Wissenschaft, the Gewerkschaft Druck und Papier, and the Gewerkschaft Handel, Banken und Versicherungen; the SPD group in the Hamburg-Wandsbek council; the Hamburg-Steilshoop branch of the SPD; and the member of the Federal Diet for Hamburg-Wandsbek, and a former mayor of Hamburg, Hans-Ulrich Klose. A group of citizens of Hamburg who were affected while the practice of "occupational bans" was applied in Hamburg, in a declaration supporting Scheer, stated that, as a result of the solidarity they had received, the Government of Hamburg had in 1979 put an end to the practice and rehabilitated those who had been affected by it.

Baden-Württemberg

331. Gerlinde Fronemann. In September 1971 Fronemann was appointed official on probation in the school service of Baden-Württemberg. She teaches at schools for handicapped children; at present at a special school for speech therapy.

332. In September 1977 Fronemann was heard by the education authority (Oberschulamt Karlsruhe), which because of her presumed membership of and activities for the DKP ordered her dismissal without notice in November. The specific allegations against Fronemann were that at least in the years 1975-1977 she had been a member of the DKP; that she had visited the German Democratic Republic in a DKP delegation; that she had participated in various DKP meetings; and that she had been elected to the committee and had been responsible for the newspaper of the DKP group of a district of the city of Karlsruhe. Fronemann refused to reply to these allegations.

333. In a communication submitted to the Commission, Fronemann said that because of the many protests by parents, colleagues, school directors, trade unions, and members of the Baden-Württemberg and Federal Diets, her dismissal was not put into effect.

334. In rejecting her internal appeal, the education authority added as a further allegation that Fronemann had co-signed a pamphlet entitled "Away with the occupational bans!" In January 1980 the Karlsruhe Administrative Court rejected her complaint. The court stated that Fronemann's many declarations that she was committed to the Constitution, which she had repeated in the hearing before the court, did not provide evidence of her faithfulness to the Constitution. In November 1981 the Baden-Württemberg Administrative Court rejected Fronemann's appeal. The court stated that by accepting a party office and being a publisher of a DKP newspaper Fronemann had identified herself with the party's programme. Her other activities - visit to the GDR and participation in DKP meetings - might, separately, not have to be evaluated as a breach of duty; taken as a whole, however, they served to complete the legal evaluation of Fronemann's conduct. The court considered it unnecessary to go into the allegation that Fronemann had signed the pamphlet against occupational bans. It concluded that since Fronemann had violated her duty of faithfulness to the Constitution, a core duty of an official, there was no cause to consider whether she

should nevertheless be kept in the service, even if account were taken of her outstanding technical aptitude and performance and of the fact that her teaching had not given rise to any reservations.

335. The Federal Administrative Court in May 1985 reversed the judgements of the lower courts and annulled Fronemann's dismissal. It based its decision on the failure of the education authority to comply with the requirement of the Staff Representation Act to consult the competent staff council before a dismissal without notice.

336. In May 1985, after the decision of the Federal Administrative Court, FDP, Grunen, and SPD members of the Baden-Württemberg Diet tabled a motion calling on the Land Government to appoint Fronemann an official for life and to refrain from the initiation of new proceedings against her. It was stated in favour of this motion that the decision of the Federal Administrative Court had annulled the dismissal without notice, and that throughout her fourteen years of teaching Fronemann had received only positive appraisals from parents, colleagues, professors and the schools' authority. The Ministry of Education and Sport replied in June 1985 that before it received the grounds for the Federal Administrative Court's decision, it could not decide whether the case should be pursued. It added that in questions concerning a teacher's duty of faithfulness to the Constitution length of service could not be a decisive consideration. Moreover, in recent years repeated court decisions had established that a violation of the duty of faithfulness generally had such a serious legal effect that the esteem in which a teacher was held by parents, colleagues, professors and the schools' authority could, in the final event, not be taken into consideration.

337. In the communication submitted to the Commission, Fronemann stated that the above-mentioned motion was handled in the Diet's standing committee; a final decision was, however, not taken because the representative of the Land Government expressed the desire to have a discussion with her first. The committee was assured that this discussion would not constitute the initiation of new proceedings against her. However, in November 1985 Fronemann was summoned by the Ministry of Education and Sport not to a discussion but to be questioned about information received from the Ministry of the Interior that she had participated in two DKP meetings, in 1984 and 1985. In a letter of 20 March 1986 Fronemann's lawyer claimed that the administration apparently still intended to dismiss her, despite her fifteen years of work in the school service of Baden-Württemberg. It seemed that the new dismissal was to be on the sole grounds that Fronemann was not willing to make a statement to dissociate herself unequivocally from the DKP. The chief of the Legal Department of the Ministry of Education and Sports of Baden-Württemberg stated that he had himself questioned Fronemann, but she had refused to answer, referring to her good teaching record. A decision would be taken once further information requested from the Ministry of the Interior was received. (Endnote 141)

338. Klaus Lipps. Lipps, a secondary school teacher of French, Mathematics and Sport, has been in the school service of Baden-Württemberg since 1969. He was appointed graduate teacher (Studienassessor) as an official on probation in April 1971. The education authority (Oberschulamt Karlsruhe) has considered Lipps' professional conduct to be irreproachable, and his behaviour correct. Lipps has been a member of the DKP since 1971.

339. After being questioned in December 1974 and March 1975, Lipps was dismissed without notice in May 1975. His internal appeal was rejected in August 1975. In October 1975 the Karlsruhe Administrative Court ordered his interim reinstatement. The same court, in November 1976, annulled the dismissal. In May 1977 the Land Government's appeal was rejected by the Baden-Württemberg Administrative Court, which refused leave to appeal. The court considered that, even if the objective condition of a breach of duty was fulfilled, the subjective condition - awareness of committing a breach of duty - was not, since prior to the decision of the Federal Constitutional Court of May 1975 Lipps could have assumed that it was not a culpable breach of duty to belong to a party that had not been declared unconstitutional.

340. At the request of the Land Minister for Education and Sports, the education authority in November 1977 again dismissed Lipps, with notice. In April 1979 it rejected his internal appeal. In September 1982 the Karlsruhe Administrative Court annulled the dismissal. The court noted that the education authority had assumed that the mere fact of becoming and remaining a member of the DKP constituted a violation of the duty of faithfulness to the free democratic basic order; there was no evidence that Lipps had been a DKP official or candidate for any office inside or outside the party. In cases hitherto decided by the courts against officials they had been incomparably more active in the party. The Land Government appealed against this decision to the Baden-Württemberg Administrative Court. In September 1985 the court rejected this appeal and refused leave for a further appeal. The Land Government's complaint against the refusal of leave to appeal was rejected by the Federal

Administrative Court in May 1986.

341. As a result of the proceedings, the development of Lipps' career has been halted since 1974; he has not been able to move beyond the position of Studienassessor and official on probation. In a communication of 4 July 1985 he said that for more than ten years he had had to live and work under the constant threat of being excluded from his occupation. In a letter of 12 January 1986 he added that even with five court judgements in his favour the Land Government was not willing to leave him and his family in peace, but wanted at all costs to prevent him from exercising his occupation.

342. A meeting of the Baden-Württemberg branch of the GEW in June 1983 requested the Minister for Education to abandon his appeal against the 1982 judgement of the Karlsruhe Administrative Court. In November 1985 the Land meeting of the technical group for secondary schools of the Baden-Württemberg branch of the GEW called on the Land Government to put an end to the nearly 12-year "persecution of Lipps" and to withdraw the appeal to the Federal Administrative Court; it also demanded his appointment as official for life. A declaration supporting Lipps was signed by over 450 persons and published as an advertisement in the *Badisches Tagblatt* in September 1985.

343. In his evidence before the Commission, in April 1986, the Chief of the Legal Department of the Ministry of Education and Sport of Baden-Württemberg stated that the Land Government had no intention to "persecute" Lipps, but wished to obtain from the highest administrative court in the Federal Republic a decision on the hitherto undecided question of what level of activity for an organisation hostile to the Constitution, beyond mere membership, had to be reached to constitute a breach of the duty of faithfulness to the Constitution justifying dismissal. (Endnote 142) In August 1986 the Commission was informed that the Ministry of Education and Sport would take a further decision in this case after it had received information requested from the Ministry of the Interior and after hearing Lipps.

Bavaria

344. Gerhard Bitterwolf. Bitterwolf, who in 1977 was elected to the federal committee of the German Peace Union (Deutsche Friedensunion - DFU) and chairman of the DFU's Bavarian branch, completed his training to become a teacher in 1978. During his preparatory service he had taught a variety of subjects in primary and secondary schools. In his evidence before the Commission, Bitterwolf stated that the Bavarian authorities had previously decided to exclude him from access to the preparatory service because of his membership of the Sozialistischer Hochschulbund (SHB); that decision had, however, been annulled by an administrative court. (Endnote 143)

345. Having applied for admission to the service and appointment as an official on probation, Bitterwolf was questioned by the Mittelfranken district administration in November 1978. The administration rejected his application as well as his internal appeal against that decision. It stated that the DFU was an organisation influenced by the DKP; whoever worked in such a prominent position in an organisation that was influenced by the DKP and co-operated and had objectives in common with the DKP justified doubts as to whether he would at all times act to uphold the free democratic basic order of the Constitutions of the Federal Republic and Bavaria. The administration also observed that Bitterwolf had participated actively in the DFU's campaigns against anti-communism and the so-called occupational bans (*Berufsverbote*). Whether Bitterwolf had proved his professional worth in the preparatory service and had refrained from political statements in his teaching was irrelevant.

346. In 1983 the Ansbach Administrative Court upheld Bitterwolf's complaint against the administration's refusal of his application. The Bavarian Government appealed against this judgement to the Bavarian Administrative Court. In his evidence before the Commission, Bitterwolf said that there had then been a modification in the apparent allegations made against him. They no longer concerned mainly his activities in the DFU, but rather his attitude towards the "Peter judgement" of the Federal Administrative Court (29 October 1981). He had criticised the judgement, when required by the administration to make a statement on it. He added that the Bavarian Government had applied this method in further cases. (Endnote 144)

347. In November 1985 the Bavarian Administrative Court reversed the judgement of the Ansbach Administrative Court; it refused Bitterwolf leave to appeal. The court observed that, after again hearing Bitterwolf, the Mittelfranken district administration had, in March 1985, again rejected his application to be appointed official on probation as a teacher at elementary schools. The administration had based its decision on his lack of faithfulness to the Constitution manifested by his

replies to the administration's questions on his attitude towards the basic principles of the free democratic basic order and by his refusal to dissociate himself from the objectives of the DKP, and on the unsuitability of his character, as he had been convicted of insulting the Bavarian Minister President. The court stated that a candidate for appointment as official on probation could not claim a right to be appointed; appointments lay within the discretion of the administration, and the administrative courts had only limited powers of review. The court ruled that, although Bitterwolf's court conviction did not suffice to impair his suitability, the doubts about his faithfulness to the Constitution were justified. The district administration had already in 1978 had well-founded reasons to question Bitterwolf about his attitude towards the free democratic basic order, because he had for many years been a member of the DFU and was a prominent official in it. Successive federal governments had regarded the DFU as being influenced by the DKP. However, the court noted also a statement in the 1978 report of the Office for the Protection of the Constitution to the effect that one should avoid associating all the active members of organisations like the DFU with communism. Because of such considerations, the district administration had had to give Bitterwolf an opportunity to express his opinion on the free democratic basic order. The administration had done this by drawing up a series of questions, and its opinion that Bitterwolf's replies did not meet the requirements of a commitment to the free democratic basic order could not be faulted.

348. The court observed that, as the requirements of a commitment to the free democratic basic order included the need to dissociate oneself from contrary endeavours and from organisations pursuing such endeavours, the administration's questions based on the grounds stated in the Federal Administrative Court's Peter judgement could not be criticised. Bitterwolf could have replied to the substance of the questions even if, for other reasons, he had wished to criticise the Peter judgement. Bitterwolf's application, said the court, had not been refused because of his activity in the DFU, which in itself did not prove a personal affinity to communism.

349. In July 1986 Bitterwolf's complaint against the refusal of leave to appeal was rejected by the Federal Administrative Court, which recalled its case law that courts were not permitted to decide themselves whether applicants were faithful to the Constitution or to replace an administration's assessment by their own.

350. In a statement in response to the Mittelfranken district administration's rejection of his internal appeal, Bitterwolf said that the school management and the parents' council of the school at which he had done his preparatory service had expressed their satisfaction with his work by requesting him to stay on to teach his class until its final examination; all the pupils of that class and their parents had signed a petition requesting the district administration to keep him on; his colleagues had expressed their confidence in him by electing him unanimously as their spokesman. After his internal appeal was rejected in 1979, Bitterwolf received statements of support from numerous persons, mainly academics. The deputy chairman of the SPD group in the Federal Diet, Horst Ehmke, stated that the proceedings were inconsistent with the SPD's attitude towards the duty of faithfulness to the Constitution in the public service. In evidence before the Commission, Bitterwolf said that he had continued to receive broad national and international support, including from the social democratic parties of the Netherlands and Denmark, as well as from 150 members of the European Parliament. (Endnote 145)

351. In a communication of 11 July 1985, Bitterwolf referred to the effects of the proceedings on his employment. Although the court of first instance had decided in his favour, he had for seven years not been able to work in the occupation for which he had been trained. In evidence before the Commission, he stated that he had been assured that the charges made against him would not have prevented his employment in Hessen and Saarland. (Endnote 146) In August 1986 Bitterwolf informed the Commission that he had been appointed a teacher in Hessen.

352. Charlotte Niess-Mache. After nearly four years of preparatory service as a revocable official in the Bavarian Civil Service, Charlotte Niess-Mache in April 1975 made an application to the Bavarian Ministry of Justice to be appointed judge on probation.

353. During her preparatory service she had joined the association of democratic jurists (VDJ). She was a member also of the SPD, and of the Gewerkschaft Öffentliche Dienste, Transport und Verkehr (OTV) and participated in the work of the association of social democratic jurists (ASJ).

354. In May 1975 Niess-Mache was informed that she would receive her certificate of appointment. Then she was told that

the requisite information from the Office for the Protection of the Constitution was still awaited.

355. In September 1975 the Ministry of Justice rejected her application: it considered that, because of her identification with the VDJ, she did not offer a guarantee that she would at all times act to uphold the free democratic basic order. The Ministry stated that, according to an assessment of the Federal Minister of the Interior, the VDJ was a communist auxiliary organisation, which had been established and was decisively influenced by left-wing radical groups, especially the DKP; the VDJ did not act on the basis of the free democratic basic order. That was to be concluded from the composition of the VDJ's federal committee, provisions of its statutes, and other evidence, including a report of the International Association of Democratic Lawyers on occupational bans against communists, social democrats, and other democrats in the Federal Republic, as well as a contribution to that report made by the VDJ. As Niess-Mache was a member of the VDJ's federal committee, one had to assume that she identified herself in an exceptional way with the VDJ's objectives and declarations. She had been a co-signatory of the invitation to the inaugural meeting, held in Munich, of the VDJ's regional group. During the hearings she had not dissociated herself from the VDJ, but had defended it.

356. After her internal appeal was rejected, Niess-Mache filed a complaint before the Munich Administrative Court. In the proceedings, Niess-Mache stated that no political party influenced the VDJ; she would definitely dissociate herself from any such influence. She had decided to join the VDJ only when she was certain that the regional inaugural meeting in Munich had clearly accepted the Basic Law as the basis for the regional group's action. The objectives in the declaration adopted by the regional meeting were similar to those in the SPD and DGB programmes. She pointed to the autonomy of the VDJ's regional groups. She participated in the VDJ as a social democrat; the political opinions of other VDJ members could not be held against her. The VDJ's activities were restricted to written and oral expressions of opinion. In their statement to the Munich Administrative Court, Niess-Mache's lawyers stressed that there had been no evaluation of her personality; not one statement made by her that could give rise to doubts about her faithfulness to the Constitution had been produced. Niess-Mache's lawyers also referred to a statement made by the Federal Minister of the Interior to the Federal Council, that one could not infer from the fact that an association like the VDJ or the SHB (Sozialistischer Hochschulbund) had communists among its members that the organisation as a whole pursued aims hostile to the Constitution, or that all the members of the association did not offer a guarantee of faithfulness to the Constitution.

357. In October 1976 Niess-Mache informed the Munich Administrative Court that the Ministry for Food, Agriculture and Forestry of North Rhine-Westphalia had appointed her official on probation, but that she nevertheless wished to continue the proceedings.

358. In October 1976 the Munich Administrative Court annulled the decision of the Ministry of Justice and ordered it to appoint Niess-Mache as judge on probation. It held that the doubts about her faithfulness to the Constitution were unfounded. The court stated that, from the information available, it could not conclude with the necessary certainty that the VDJ pursued aims hostile to the Constitution. The Ministry of Justice should have examined the VDJ's own aims. Instead it had incorrectly reasoned that the VDJ's aims were hostile to the Constitution because the DKP, which had such aims, controlled the VDJ. Even if the VDJ pursued aims hostile to the Constitution, the Ministry's doubts about Niess would be legally unfounded. If, as required, the circumstances of the individual case were carefully taken into account, her membership of the VDJ did not give rise to serious concern. The Ministry had focused its evaluation not on her personality as a whole, but on one aspect, namely, her active membership of the VDJ. There was no concrete conduct on her part to suggest that she had espoused VDJ objectives that were possibly hostile to the Constitution. She had, for example, said she did not support certain observations made in a speech by the chairman of the VDJ, and that that speech, which had played an important role in the Ministry's charges against her, had prompted wide discussion and controversy in the VDJ.

359. In November 1977 the Bavarian Administrative Court, reversing the judgement of the Munich Administrative Court, upheld the refusal by the Ministry of Justice to appoint Niess-Mache as a judge on probation and the Ministry's reasons for that refusal. The Court stated that judicial review of an administration's rejection of an applicant was restricted to considering whether the administration had based its decision on incorrect facts, had misjudged the applicable norm or the limits of its discretion as determined by civil service law and the Constitution, or had introduced arbitrary considerations. A court could not replace an administration's assessment by its own; as a rule, it could not oblige an administration to engage a complainant in the civil service. In the case of Niess-Mache there was no reason to order the administration to reconsider its decision. The VDJ

did not act on the basis of the free democratic basic order. It had been founded on the DKP's initiative, since its foundation had been under considerable DKP influence, and could not take important decisions against the will of the DKP. Given Niess-Mache's critical remarks about some of the VDJ's initiatives and her assurance that she had enough self-confidence to stand up for her opinions and not to become the tool of communists, the Court observed that she should have been all the more willing to consider whether, as a member of a party that formed the Government of the Federal Republic, she should continue to help maintain the VDJ's semblance of non-partisanship. The Court refused Niess-Mache leave to appeal.

360. In evidence before the Commission, Niess-Mache said that she had been unemployed for quite a long time; as she was considered to be "an extremist", lawyers did not want to employ her. She confirmed that the Government of North Rhine-Westphalia had engaged her in 1976 and a few years later had appointed her official for life. (Endnote 147)

361. After the Bavarian Administrative Court had upheld the Bavarian Government's decision to refuse her application, the CDU group of the North Rhine-Westphalia Diet questioned the minister employing Niess-Mache about her future employment in the public service of North Rhine-Westphalia. The minister noted that the judgement of the Bavarian Administrative Court contained 13 long quotations from statements by VDJ members; there was, however, no quotation from any statement made by Niess-Mache herself.

362. In reply to a question of the Commission, the Chief of the Personnel Department of the Bavarian Ministry of Finance stated that at the time Niess-Mache made her application in Bavaria, she would not have been considered to be suitable for a position such as the one she currently held in North Rhine-Westphalia. (Endnote 148)

363. While the case was pending in Bavaria, Niess-Mache received the support of the SPD. The SPD group of the Federal Diet described the refusal to appoint her as "legally and politically intolerable". In a letter to the Minister President of Bavaria in November 1975, the Chairman of the SPD in South Bavaria expressed the view that a member of the social democratic party was being prejudiced for participating and promoting social democratic policy in a non-party organisation. He feared that this case might become a precedent for a practice under which members of the social democratic party, without their specific cases being evaluated, suffered discrimination in employment in the public service because they were active and upheld the free democratic basic order in non-party groups in which also DKP members participated. Similar points were made in a letter to the Bavarian Minister of Justice from the South Bavarian committee of the association of social democratic jurists.

364. In a statement to the Federal Council in November 1975, the then Federal Minister of the Interior expressed his concern over cases in which applications for employment from SPD members had been rejected because of their candidatures for the SHB or their membership in the VDJ; there was a danger that the means used to defend a State based on the rule of law might themselves infringe the rule of law.

Lower Saxony

365. Karl-Otto Eckartsberg. Eckartsberg, an English and Sports teacher, has been employed since 1975 at a comprehensive school in Garbsen, Lower Saxony. In 1978 he was appointed official for life. According to a statement referred to in the judgement of the Lower Saxony Disciplinary Court Eckartsberg's performance at the school was favourably appraised; there was no evidence of his having sought to indoctrinate his pupils. In 1980 the Hannover district administration made him the school's director of social studies.

366. From 1969 to 1979 Eckartsberg was a member of the SPD; for a time he was the chairman of the Young Socialists of the Hannover-Land branch of the SPD. In 1979 Eckartsberg left the SPD and joined the DKP. He has stated that the practice of "occupational bans" had strengthened him in his resolve to make this change.

367. In February 1982 the Lower Saxony Minister of the Interior informed the Minister of Education that Eckartsberg had been a DKP candidate in the September 1981 communal elections. The Hannover district administration initiated investigations, and in June 1982 disciplinary proceedings. In September 1983 the disciplinary chamber of the Hannover Administrative Court found him guilty of a breach of the duty of faithfulness to the free democratic basic order, and ordered his dismissal.

368. In January 1984 Eckartsberg appealed to the Lower Saxony Disciplinary Court. After the judgement of the Hannover Administrative Court he had been suspended, pending a final judicial decision; his pay was reduced by 40 per cent, and he was not allowed to take on any other paid activity. His complaints against the suspension were rejected by the Hannover Administrative Court (December 1983) and the Lower Saxony Disciplinary Court (December 1984).

369. In its judgement (26 June 1985) on the principal appeal, the Lower Saxony Disciplinary Court reversed the judgement of the Hannover Administrative Court. The court held that, although Eckartsberg's conduct constituted an objective breach of duty, it had not been culpable. He had publicly identified himself with the programme of the DKP by being its candidate. Whether or not he himself approved the DKP's programme and objectives as a whole or only in so far as he considered them to be constitutional was irrelevant. It had, however, not been possible to prove that he had realised that his conduct constituted a breach of duty. The court attached considerable weight to Eckartsberg's argument that, in view of the previous attitude of his employer, he could not have assumed that as a result of his DKP candidacy he would be charged with a serious breach of duty; the Land Government had stated in 1976 that its policy was not to initiate disciplinary proceedings against officials who stood as DKP candidates in elections. The Government had obviously changed its practice as a result of the Peter judgement of the Federal Administrative Court.

370. The Lower Saxony Ministry of Education did not appeal against the Lower Saxony disciplinary court's decision; Eckartsberg was reinstated.

371. In November 1985, the Land Government issued a circular regarding the violation by officials of the duty of faithfulness to the Constitution by participating in endeavours hostile to the Constitution and standing as a candidate for a party hostile to the Constitution. The circular drew the attention of all officials to two judgements of the Lower Saxony Disciplinary Court, including that in the Eckartsberg case, to make clear that a candidacy for the DKP in elections violated an official's duty of political faithfulness and that in such cases the employer was under an obligation to initiate disciplinary investigations.

372. In July 1986 the Hannover district administration initiated new disciplinary proceedings against Eckartsberg. It stated that, according to preliminary investigations, he had been elected in January 1986 president of the Hannover-Land branch of the DKP, and in March 1986 to the Lower Saxony council of the DKP, and that he had received the Ernst Thälmann medal of the DKP for his services to the party and his efforts in the struggle against "occupational bans". By being a member of the DKP, and by accepting high party office and a party decoration, he was suspected of identifying himself fully with the aims and programme of a party that was unanimously considered to pursue objectives hostile to the Constitution, placing his status as a Lower Saxony official at the service of that party. In August Eckartsberg was suspended, on the ground that the gravity of the alleged disciplinary offence would probably result in his removal from the service. According to a press report, Eckartsberg has said that neither during the proceedings that ended with his reinstatement nor afterwards had it ever been made a condition that he should not accept functions within his party.

373. Eckartsberg is a member of the GEW. At its 1983 federal congress, the GEW adopted a resolution protesting against "occupational bans" in Lower Saxony in general and against the judgement of the Hannover Administrative Court against Eckartsberg and his suspension in particular. The resolution called on the Land Government to put an end to all politically motivated disciplinary proceedings, to respect the principle that no one was to be dismissed from the public service as a result of exercising a basic right, to rehabilitate and reinstate all those affected, and to put an immediate end to the surveillance of persons exercising their democratic rights. In May 1986 the Lower Saxony branch of the GEW protested against the administration's intention to initiate new proceedings against Eckartsberg; it was intolerable that someone should be threatened with the destruction of his occupational existence on account of his legal activities for a legal party. In discussions with the Commission in August, representatives of the GEW said that the new proceedings against Eckartsberg and a number of other teachers represented an intensification of the practice in Lower Saxony; for the first time purely inner-party activities were being used as evidence of a violation of the duty of faithfulness.

374. Matthias Schachtschneider. Schachtschneider, a teacher, has been in the service of Lower Saxony since 1960. He was appointed official for life in 1964. In 1974 he was appointed principal at a teacher-training college in Oldenburg and director of German studies for state teacher-training colleges.

375. In 1980 he received from the Land Minister for Education of Lower Saxony a certificate of recognition for "twenty-five years of conscientious fulfilment of duty". In a formal appraisal made in 1982 Schachtschneider was described as a committed and successful teacher with an irreproachable attitude to his work, whose political views were apparent neither in his seminar work nor in his teaching.

376. From 1966 to 1980 Schachtschneider was a member of the SPD. He was elected SPD member of the municipal council of Oldenburg in 1969, 1972 and 1976 and from 1972 to 1976 was the chairman of the SPD group in the council. In 1972 he received from the mayor of Oldenburg a special recognition for his services to the town as a member of the municipal council. In 1981 he was elected to the municipal council as an independent candidate on the DKP list; he became the deputy chairman of the DKP council group. He joined the DKP in June 1982. Schachtschneider is a member of the GEW.

377. The Weser-Ems district administration initiated investigations in April 1982. After Schachtschneider had been questioned in April, May and June 1983, the district administration initiated proceedings against him in the Oldenburg administrative court in December 1983. He was alleged to have violated the duty of faithfulness to the free democratic basic order by his candidacy as an independent on the DKP election list, by his activity in the DKP municipal council group and by his application for membership of the DKP. In December 1985 the district administration formulated supplementary charges. It stated that although Schachtschneider had in the course of the disciplinary proceedings been informed fully of the legal views of his employer and of the Lower Saxony Disciplinary Court (Eckartsberg judgement), he had seen no reason to leave the DKP or to give up his role in the DKP group in the municipal council. When questioned again in September 1985, Schachtschneider accused the district administration of constantly hindering, by the disciplinary proceedings against him, his work for the electorate and the legally-protected exercise of his elective mandate.

378. In June 1982 the committee of the Weser-Ems branch of the GEW protested to the district administration against the initiation of investigations against Schachtschneider and other GEW members who had been candidates on DKP election lists. Over the years, the GEW has continued to protest against the disciplinary proceedings and measures taken in Lower Saxony against some 20 teachers. The committee of the Oldenburg branch of the DGB has also protested against the disciplinary proceedings. In June 1985 the Weser-Ems district staff council for teachers expressed to the district administration its deep concern at the proceedings against Schachtschneider and 10 other teachers in the district who had been on DKP election lists; it appealed to the administration to abandon the proceedings and to reinstate those teachers who had been suspended. In 1984 the Lower Saxony state congress of the SPD adopted a resolution protesting against the intention of the Land Government to dismiss teachers because they had stood as candidates for a party which was legal.

Rhineland-Palatinate

379. Wolfgang Jung, Jung, who has been in the school service of Rhineland-Palatinate since 1960, teaches mathematics, German, art, handicrafts and labour studies. He was appointed official for life in 1965. Since 1966 he has taught at a secondary school in Kaiserslautern. Jung has been an active member of the GEW for many years. From 1974 to 1975 he was a member of the staff council at the Kaiserslautern city school administration. Since 1975 he has been a member of his school's staff council.

380. An inquiry was made after Jung was anonymously denounced to the Rheinhessen-Pfalz district administration on the basis of a fabricated press announcement. In January 1982 the district administration initiated preliminary investigations, alleging that he was a member of and held a position of responsibility in the DKP. In April 1985 the district administration initiated proceedings in the Neustadt/Weinstrasse Administrative Court with a view to Jung's dismissal. He was charged with having violated his duty of faithfulness to the Constitution by engaging in activities in and for the DKP. The complaint observed that Jung had refused to reply to the individual accusations and the complaint as a whole.

381. When these proceedings were initiated, the President of the district administration asked Jung to return a certificate issued to him a few days earlier, by which the district administration had expressed its thanks for 25 years of faithful services to the community. The President said that, as Jung was an active member of the DKP, he could not be thanked for faithful services in the wider sense of the term resulting from his duty of faithfulness to the Constitution, and that the certificate had been issued in error.

382. In its judgement of 21 February 1986, the Neustadt/ Weinstrasse Administrative Court, found that by holding office in the DKP Jung had committed a breach of duty. It noted, however, that he had given up such office two years before, and since then had possibly not been guilty of any breach of duty. The court found that during his 25 years of service Jung had at no time misused his position as a teacher or tried to influence his pupils politically, and that neither in his teaching nor in his contacts with pupils, parents, colleagues or superiors, his active membership of the DKP had become apparent. It concluded that there was no danger of any change in his conduct in future, and that he was therefore fit to remain in service. Nevertheless, because of his having held office in the DKP in the past and in order to ensure that he would not resume any similar level of activity in the DKP, the Court ordered a 15 per cent reduction in pay for three years. According to Jung and his union, the GEW, this will entail a loss of DM20,000. The Commission was informed that Jung had decided not to appeal against this judgement in order not to risk a more severe sanction (dismissal), in the event of an appeal also being filed by the administration.

383. In October and November 1982 the Rhineland-Palatinate and Kaiserslautern-Kusel branches of the DGB called on the authorities to abandon the proceedings against Jung. In June 1985 the conference for officials of the Rhineland-Palatinate branch of the DGB called on the Land Ministry of Education and on district administrations to abandon disciplinary proceedings and to annul the sanctions imposed on seven teachers, including Jung. Among various statements of protest and support by the GEW is a letter sent to the ILO in December 1985 by the chairman of the Rhineland-Palatinate branch of the GEW which describes Jung as an irreproachable democrat, active trade unionist and qualified and respected teacher. In a letter sent to the district administration in March 1983, the teaching staff of the school at which Jung teaches stated that his commitment, knowledge, and willingness to co-operate with others had made him a popular and respected colleague at the school.

384. Maria Lachmann. A teacher for educationally handicapped children, Lachmann has been in the school service of Rhineland-Palatinate since 1964. She was appointed official for life in 1970. In 1981 the Koblenz district administration appointed her tutor for teacher trainees. Since 1984 Lachmann has been a member of the Bad-Kreuznach branch of the GEW.

385. In November 1983 the Land Ministry of Education informed the Koblenz district administration that it had received information about Lachmann from the Land Ministry of the Interior, and requested it to initiate investigations; if the information was confirmed, the district administration should seek, on the basis of the Peter judgement of the Federal Administrative Court, to dismiss Lachmann.

386. In February 1984 the Koblenz district administration informed Lachmann that their investigations had revealed that she had since 1973 continually participated in internal and public DKP meetings. She had also been elected to a position in the Birkenfeld/ Nahe branch of the DKP. Disciplinary proceedings were initiated in April 1984. When questioned in May 1984, Lachmann stated that, as her husband was a member of the DKP, she had attended, as his wife, some of the specified meetings, which had all been public. She did not exercise any functions in any political party, either within a party or as candidate in elections.

387. The chairman of the staff council at Lachmann's school testified in the disciplinary proceedings that as far as he knew she was not a member of the DKP. He said that she was a popular and highly-regarded colleague, and was fully accepted by the school's teaching staff. Lachmann had never given him cause to doubt her faithfulness to the Constitution. In 1984 Lachmann was elected to the staff council.

388. In his testimony the school's headmaster called her an enthusiastic and qualified teacher. Having supervised her teaching, he had never had reason to believe that she was introducing DKP ideas into her lessons. The teaching staff has protested against the disciplinary proceedings to the Land Ministry of Education and to the district administration. In May 1984 the committee of the Rhineland-Palatinate branch of the GEW called on the district administration to abandon the disciplinary proceedings. Similar appeals have been made by the local branches of the DGB and the SPD. The proceedings are still pending.

Schleswig-Holstein

389. Thomas Bürger. Bürger, a teacher at a comprehensive school at Kiel-Friedrichsort, Schleswig-Holstein, has been an official on probation since 1979. He is a member of his school's staff council.

390. In a communication of July 1985, Bürger, who was to have been appointed official for life in 1982, stated that for three years the Government of Schleswig-Holstein had been trying to dismiss him. On the basis of unsubstantiated information from the Schleswig-Holstein Office for the Protection of the Constitution he was suspected of being a member of the DKP. He was asked to state whether he was a member of the DKP and to dissociate himself from that party. He refused, basing himself on his constitutional rights.

391. In August 1982 the Ministry of Education notified Bürger that he would be dismissed as from June 1983. The dismissal was confirmed in May 1983, when the Ministry stated that apart from the information from the Ministry of the Interior there was no further information on his DKP activities. According to the Ministry of Education, the suspicion of insufficient faithfulness to the Constitution was in itself not a sufficient reason to dismiss him; however, when it was related to his refusal to dissociate himself from the DKP and to explain his relation to the DKP, one could conclude that he did not guarantee faithfulness to the Constitution. That the information against him could not be sufficiently proved was of no legal relevance. The Ministry confirmed that Bürger's conduct and performance in service had been good.

392. As a result of his internal complaint Bürger's dismissal was annulled in July 1983 because the staff council had not been consulted. Upon a renewed attempt by the Ministry to proceed to dismissal, the staff council refused to give its approval. Under the Schleswig-Holstein Staff Representation Act, officials who are staff council members cannot be dismissed without the council's approval. In October 1983 the Ministry applied to the Schleswig Administrative Court to substitute a court decision for the refused staff council approval. In September 1984 the court rejected the complaint, stating that such a substitution was not possible. The Land Government then made, but afterwards gave up, an attempt to obtain a retroactive amendment of the Staff Representation Act. It also appealed to the Lüneburg Higher Administrative Court, which in June 1985 reversed the Schleswig Administrative Court's ruling on the ground that a court could substitute its consent and remitted the case to the Schleswig Administrative Court for decision.

393. In a letter to the Minister of Education and the Arts (22 October 1982) the committee of the parents' council of Bürger's school expressed its full confidence in Bürger and stated that, in his teaching and privately, he had at all times supported the free democratic basic order. The committee called for the withdrawal of the dismissal. The pupils, teachers and parents at Bürger's school organised a soliarité fête for Bürger. In June 1983 the chairman of the Schleswig-Holstein branch of the GEW protested against the intended dismissal, and stated that the GEW would help him to use all available judicial remedies. Bürger is a member of the GEW and deputy chairman of the technical group for comprehensive schools of the GEW, Schleswig-Holstein. The chairman of the SPD group in the Schleswig-Holstein Diet observed in May 1983 that the proceedings represented a new development in the application of the decree on extremists; there was now the danger that mere suspicion of DKP membership would suffice to justify a dismissal from the public service.

CHAPTER 7

THE POSITION OF THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY

394. As already indicated in Chapter 2, by letter of 27 March 1986 the Government of the Federal Republic of Germany transmitted a statement of its position in regard to the alleged violation of Convention No. 111, to which was appended a legal opinion by Professor Karl Doehring, Professor of Public Law and International Law at the University of Heidelberg and Director at the Max-Planck Institute for Foreign Public Law and International Law.

395. The text of the Government's statement was as follows:

(Translation)

The Government of the Federal Republic of Germany has already, in its letter of 31 January 1986, made certain observations on the manner in which this inquiry is proceeding. The Chairman of the Commission of Inquiry replied in a letter of 28 February 1986 and dispelled some of the doubts entertained by the Government of the Federal Republic. Without going into detail, it should be emphasised again that, in the opinion of the Federal Government, to give the World Federation of Trade Unions a role similar to that of a complainant would be incompatible with the ILO Constitution and also cannot be based on any standing

practice. On this point and on other questions of procedure which have already been raised, the Federal Government reserves the right to make further observations. The Government of the Federal Republic of Germany would like now to submit some comments on the questions of law that have been raised and, where necessary, on the statements and submissions made by the other side, and thus to respond to the request made in the letter of 27 November 1985 from the Chairman of the Commission of Inquiry. At the same time, it wishes once more to express its firm conviction that the obligations to safeguard faithfulness to the Constitution in the public service are fully consistent with the letter and spirit of Convention No. 111 concerning discrimination in respect of employment and occupation.

The Federal Government cannot forbear to point to the political dimension of the representation made by the World Federation of Trade Unions on 13 June 1984 and of other documents submitted in the inquiry; in particular because it does not seem that all those showing an interest in the inquiry are concerned with a matter of law.

It must be emphasised first of all that the Federal Republic of Germany is, both historically and geographically, in a special position. For one thing, it has already had to learn by painful experience how much faster and more easily a totalitarian regime contemptuous of human beings and their fundamental rights establishes itself if it can rely on part of the body of officials. It was by no means only the leading elements in the administration and the judicial system that played a decisive part but also, specifically, teachers and "petty officials" in all fields. The Federal Republic of Germany learned from this that a body of officials of inherently democratic convictions constitutes one of the most effective guarantees of a free democracy which respects and promotes human rights in all fields and thus contributes to peace and freedom world-wide. Furthermore, after the end of the Second World War, it proved possible to set up a free and democratic State only in part of Germany. From its inception, therefore, the Federal Republic of Germany was compelled to defend its free democratic state order against forces that want to set up a corresponding totalitarian dictatorship also in the free part of Germany. Since it became clear to those forces that the democratic State knew how to defend itself, they have been seeking help from outside in order to breach that defence and thus attain their goal.

The political line of attack is evident from the mere fact that neither in the cases on which the Governing Body Committee based its report nor in other cases which the Commission of Inquiry has taken into account in its investigation have the domestic remedies been exhausted. The Federal Government has already pointed this out on several occasions. Although it is claimed over and over again that the conduct of the Executive and the decisions of the courts are contrary to the Constitution, the Federal Constitutional Court is avoided. This, the highest court in the Federal Republic of Germany, has the task of making a comprehensive examination on the merit of every alleged violation of rights to freedom and making a final binding decision thereon.

This behaviour is no accident. Thus, Angenfort, a member of the Presidium and of the Secretariat of the Executive Committee of the German Communist Party (DKP) - to the political spectrum of which party all the individual cases included in the inquiry so far can be ascribed - was asked in an interview why members of the DKP did not appeal to the Federal Constitutional Court in relevant cases (interview published in *Unsere Zeit* of 25 January 1986 and partly broadcast in the Third Programme of the North German Radio on 22 January). He replied: "First I must just say that the Prime Ministers' decision of 1972 on job bans (Berufsverbote) is a political decision. And we think that a political decision should be opposed through a political movement. And that is excellent ..." Later on, he said: "If in the judgement, the possible judgement of the Federal Constitutional Court, even one formulation crept in which in some way or other sought to justify job bans, that in itself would be to the detriment of all democrats. And because we see a chance to get rid of the job bans altogether - and they must be swept away because they are unconstitutional - our path does not lie to the Federal Constitutional Court, whose dubiousness with regard to the Basic Law has already been demonstrated in relation to the Greens; our way is to appeal to the public, through the movement against job bans, even more strongly than before and to trust in its support. We are sure that that is the right way."

With its representation, the World Federation of Trade Unions wished to support the political struggle thus formulated and thus to come to the aid of those who have made it their aim to destroy the free democratic basic order in the Federal Republic. The Federal Republic is to be compelled to rescind precisely those provisions and measures which can most effectively protect freedom and democracy also in the future. A secure place in the state machinery of the Federal Republic of Germany is thus to be won for the members of the German Communist Party as the ideological representatives of a completely different state and social order. This aim is to be achieved even at the cost of once again opening access to public posts in the Federal Republic of

Germany to right-wing extremists as well.

The International Labour Organisation and its organs are too important for the dissemination of human rights in the world of work to allow themselves to be misused as a weapon in the struggle against freedom, democracy and human rights and thus against the Organisation's own purposes. Its Conventions have not been concluded in order that freedom in the world of work and the operation of free trade unions should be curtailed or eliminated with their help. The Federal Republic of Germany does not understand why it should be prevented from drawing the necessary conclusions from its history and accordingly securing its free democratic basic order.

The Federal Government has already set out its view of the legal position on several occasions in the preceding examination of the representation, in particular in its letter of 18 December 1984 and in the statement made by its representative before the Governing Body of the International Labour Office on 3 June 1985. With express reference to those statements and to all previous statements of the Government's position made before bodies of the International Labour Organisation on the questions at issue, the position of the Federal Republic of Germany is once more set out comprehensively below. The following points will essentially be the focus of attention:

- Can Convention No. 111 be applied at all to the relationship of officials, characterised by special rights and duties? (Section I).
- Can any comprehensive evaluation of the practice of a State be made by international bodies before domestic remedies have been exhausted? (Section II).
- The measures adopted in the Federal Republic of Germany to maintain a public service faithful to the Constitution serve the defence of freedom and human rights. The area of protection of Convention No. 111 is not affected thereby (Section III).
- The Federal Republic of Germany knows no discrimination in the public service on the basis of political opinion. Freedom of opinion is guaranteed by the national Constitution (Section IV).
- The special duties of officials are requirements based on a particular job. Article 1, paragraph 2, of Convention No. 111 rules out any violation of the Convention (Section V).
- A violation of Convention No. 111 by the Federal Republic of Germany is also ruled out by Article 4 (Section VI).

In discussing these questions, the Federal Government will also refer directly or indirectly, on individual points, to the report of the Committee set up to examine the representation made by the World Federation of Trade Unions on 13 June 1984 (hereinafter referred to as the "Governing Body Committee"), although its conclusions and recommendations are of no direct relevance to the present proceedings.

I. Application of Convention No. 111 to officials

In examining whether the measures taken in the Federal Republic of Germany to maintain a public service faithful to the Constitution are compatible with Convention No. 111, the first question is whether that Convention also applies to the relationship of officials characterised by special rights and duties. In answering this question, the Federal Government has hitherto been guided by the conviction that the special demands made on those employed in the public service, and in particular on officials, should be regarded as requirements of a particular job within the meaning of Article 1, paragraph 2, of Convention No. 111. However, since that interpretation, which served the International Labour Organisation's interest in a broad scope for its Conventions, was not shared by the Governing Body Committee, and since at the sitting of the Governing Body on 3 June 1985 the Workers' side raised the question whether Convention No. 111 as at present worded permits the appropriate regulation of the situation of members of the public service having regard to the special requirements of the status of officials, this question of principle must be answered. The question has general significance for the International Labour Organisation and all its member States. For there are special forms of relationships for officials or state servants in most States of the world.

In this connection, the question needs to be raised whether employment relationships can fall within the area of protection of the Convention if they are not characterised by a typical employer-employee connection, which is the case for officials in the

Federal Republic of Germany. Thus it is typical of an official's employment relationship in the Federal Republic of Germany that it relates to a function of state sovereignty. The distinction drawn by the Committee set up to examine the representation (see GB.229/5/11, para. 32(d)) between officials engaged in the administration of the State and officials in technical positions may correspond to the legal situation in certain other States Members of the ILO. It does not, however, correspond to the situation in the Federal Republic of Germany. Another question which might be of background relevance here is whether it can be left to a State's discretion whether or not to assign sovereign functions to employment relationships. In this context, however, that question can be left aside, for Convention No. 111 does not regulate the powers of States Members of the ILO to decide, in detail, on the form which their legal relationships with such employees is to take. It is of no relevance for this purpose whether activities comparable to those carried on by officials in the Federal Republic are, or can be, regulated, in the same member State or in other member States, also within the framework of an ordinary employment relationship in the public service. Whether, in an individual case, an employment relationship (with or without a sovereign function) or the relationship of an official (with a sovereign function) is chosen will be decided by each authority in accordance with the laws of the State concerned, whose conformity with Convention No. 111 is not at issue.

These considerations might suggest the answer that the relationships of officials in the sense described above ought not to be judged in terms of Convention No. 111.

However, should the Commission of Inquiry consider Convention No. 111 to apply also to relationships of officials, it would be necessary, in accordance with the Federal Government's original view, to give special consideration to the special nature of the status of officials at least in interpreting Article 1, paragraph 2, of Convention No. 111 (on this point, see also Section V).

II. Failure to exhaust legal remedies

In view of the independence and high authority of international bodies, the question arises whether any comprehensive evaluation can be made by those bodies of the practice of a State before domestic remedies have been exhausted. This question becomes particularly important where the subject of inquiry is not the statutory provisions as such but their practical application. Thus, in one of the three cases on which the Governing Body Committee based its report, the official concerned has in the meantime been cleared at second and last instance. In the other two cases, too, the persons concerned - as in the other individual cases of which details have been communicated by the Commission of Inquiry to the Federal Government - have not exhausted all domestic remedies and have not appealed to the Federal Constitutional Court, which would above all have been competent to decide on their claim that the measures and judicial decisions taken were unconstitutional.

Individual cases may be deemed conclusive evidence of particular circumstances only when the proceedings have been concluded by a decision at last instance. Only then do they become a noteworthy component of the overall picture which the Committee must make for itself. An exception could be valid only if the exhaustion of domestic remedies could not be expected, for example, because the existing case law of the Federal Constitutional Court - the only relevant factor here - had already settled the matter. Since there has been only one relevant decision so far, in 1975 (see *Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 39, pp. 334 et seq.*), and it leaves open a series of questions on which the decision in individual cases may depend, cases in which exceptionally the exhaustion of domestic legal remedies could not be expected are hardly likely to arise. That would apply also if further decisions concerning DKP activists had been given by committees under section 93 of the Federal Constitutional Court Act. Although such committees are not "the Federal Constitutional Court", their decisions exhaust the domestic remedies because those concerned cannot appeal from them, for example, to the competent division of the Federal Constitutional Court. However, such decisions are mostly limited to a few brief indications and do not contribute any particular new legal considerations; otherwise it would not be possible for a decision to be taken under section 93a of the Federal Constitutional Court Act and the competent division would have to take the decision.

Since the DKP activists whose cases are presented here by WFTU have deliberately refrained from exhausting domestic remedies, and in particular have not appealed to the Federal Constitutional Court, their cases cannot be used.

This is also recognised in cases where it is no longer possible to exhaust the legal remedies because the person concerned has allowed the time-limit to elapse (see the consistent view of the ILO Committee on Freedom of Association, Official Bulletin, Vol. LX, 1977, Case No. 866, paragraph 78, with further references).

The DKP has obviously given instructions to its Party activists, which they have followed, not to appeal to the Federal Constitutional Court against decisions unfavourable to them. Jupp Angenfort, a member of the Presidium and of the Secretariat of the Party Executive Committee, who, incidentally, was also a member of the Secretariat of the Party Executive Committee in the Communist Party of Germany (KPD), which was later prohibited by the Federal Constitutional Court (see Pfeiffer/Strickert, KPD-Prozess, Dokumentarwerk, Vol. 3, p. 261), justified this in the television interview of 22 January 1986 which has already been mentioned. Presumably the DKP is afraid that, if one of its adherents were to appeal to the Federal Constitutional Court, the Court might rule that the DKP was a successor organisation to the prohibited KPD and therefore prohibited *ipso jure*.

At all events, a failure to exhaust domestic remedies consisting in non-utilisation of a sequence of available legal procedures should also be taken into consideration in the examination of the facts in proceedings in which it is claimed that an ILO Convention and consequently international law have been violated (see Committee on Freedom of Association, 168th Report, Case No. 866, paragraph 78 (OB, Vol. LX, 1977, Series B, No. 3, p. 15, with further references)).

Furthermore, the Federal Government holds it to be a misuse of international bodies supervising standards if recourse is deliberately made to them directly for political reasons, by-passing the highest domestic jurisdictions.

A corresponding procedure is also followed in other international bodies. Thus the European Commission of Human Rights, in a comparable case, rejected a complaint as irreceivable on account of non-exhaustion of domestic remedies (Decision of 16 December 1982, Complaint No. 9251/81, *Neue Juristische Wochenschrift* (NJW), 1984, 549/550, 551; *Europäische Grundrechte-Zeitschrift* (EuGRZ), 1983, 411). The Human Rights Committee of UNESCO, too, at its meeting of 17 May 1983, deferred action on two complaints pending the exhaustion of domestic remedies.

Even supposing the exhaustion of domestic remedies, there would still be appropriate cases for inquiry into whether practice in the Federal Republic of Germany was compatible with Convention No. 111. On this point reference need only be made to proceedings pending before the European Court of Human Rights in which that condition has been met. The representative of Dr. Kosiek stated before the European Court of Human Rights at Strasbourg in the oral proceedings on 22 October 1985 that he had also applied in the matter to the International Labour Organisation and claimed a violation of Convention No. 111. If that assertion should be correct, this case has obviously not been included in the inquiry.

Further, Dr. Huber, attorney-at-law, the permanent legal representative of the Executive Committee of the National Democratic Party of Germany (NPD), informed the Federal Minister of Defence in a letter of 31 July 1984 that in future every case of "discrimination" would be immediately submitted to the International Labour Organisation and that all previous cases would also be reported. Appropriate inclusion of these types of cases would clearly be helpful to an inquiry into the overall context of the domestic application of Convention No. 111.

III. Area of protection of Convention No. 111

In the Federal Government's opinion, the measures taken in the Federal Republic of Germany to maintain a public service faithful to the Constitution do not affect the area of protection of Convention No. 111. For the concern of the Federal Republic of Germany, like that of the International Labour Organisation, is to defend and spread human rights in the world of work, not to restrict or to eliminate them.

The Constitution of the Federal Republic of Germany is therefore designed to guarantee a free and democratic Germany for all time. It is based on the principle of a "democracy capable of defending itself", i.e. on the idea that no one may misuse the rights to freedom guaranteed by the Constitution for the very purpose of destroying this free democratic state order (see Federal Constitutional Court, decision of 22 May 1975 (2 BvL), 13/73, BVerfGE 39, 334/368 et seq.). The measures laid down by the Basic Law to secure freedom include the duty imposed on officials, with constitutional force, by article 33, paragraph 5, of the Basic Law to bear witness by their entire conduct to their support for the free democratic basic order within the meaning of the Basic Law and to act to uphold it (section 52(2) of the Federal Civil Service Act and section 35(1), third sentence, of the Civil Service (General Principles) Act). Legislation, administration and court decisions in the Federal Republic of Germany are bound by this constitutional precept. Any departure from the protective measures for the maintenance of a public service faithful to the Constitution is therefore out of the question.

Moreover, none of the socially relevant groups in the Federal Republic of Germany deviates from this basic position. The Social Democratic Party of Germany (SPD) group in the Lower House of the Federal Parliament (Bundestag) emphasised only recently, in a motion dated 29 January 1986, that a person employed in the public service may not by his actions combat the basic principles of the Constitution. Also the German Confederation of Trade Unions (DGB), in its letter of 27 January 1986, does not question this principle. The resolutions of 1972, 1976 and 1980 transmitted by the German Railway Workers' Union with its letter of 30 January 1986 contain corresponding statements.

The Federal Government is not of the opinion that the interpretation of Conventions should be subject solely to national judgement by the member States, thus depriving them of their value. However, it can only serve the purposes of the International Labour Organisation if an intensive and well-prepared dialogue leads to an interpretation of a Convention that is acceptable to all.

The Commission of Inquiry might bear in mind in this connection that the Federal Republic of Germany, inter alia, on account of its particular historical past, must protect itself from a situation in which individual servants of the State who have sworn to be faithful to its Constitution can call a dictatorship into existence by citing Convention No. 111 in an inadmissible manner. No one who champions totalitarian systems can have a place in the service of the State. The protection of freedom cannot be entrusted to its opponents. Indeed, this corresponds to the United Nations International Covenant on Civil and Political Rights. The Covenant provides in Article 5:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

Consequently, the Federal Republic of Germany regards itself as fully in conformity with the protective ideas of Convention No. 111 if it does not employ in the state service officials who advocate a totalitarian system. Only a person who wishes to combat and destroy:

- respect for the human rights embodied in the Basic Law;
- the sovereignty of the people;
- the separation of powers;
- the accountability of the Government and administration in accordance with law;
- the independence of the courts;
- the plurality of political parties and equality of opportunity for all political parties with the right to form and exercise opposition in conformity with the Constitution;

(for these components of the free democratic basic order, see BVerfGE 2, 12; 5, 140) can be affected at all by measures to maintain a public service faithful to the Constitution. In the Federal Government's opinion, a democratic State cannot be forbidden to demand of its officials that they support these most elementary principles of every democratic body politic. In this fundamental and comprehensive guarantee of the freedom and human rights of all citizens there can be no attack on those very rights. This position cannot conflict with the principles of the International Labour Organisation.

A Convention of the International Labour Organisation, which is a guarantor of human rights in the world of work, cannot be used to the advantage of persons who hold human rights in contempt. That would turn the International Labour Organisation's efforts into their opposite.

It is precisely the aforementioned indispensable elements of a free democratic order proper to a State based on law and social welfare that the Federal Republic of Germany, in common with the International Labour Organisation, is striving to protect. In this connection it also refers to the statement of the position of the Confederation of German Employers' Associations of 31

January 1986, which is based on similar considerations.

Hence the legal and constitutional position in the Federal Republic of Germany is fully in accord with Convention No. 111 concerning discrimination in respect of employment and occupation, so that there is no call for a change in domestic practice, even if that were possible. The Federal Republic of Germany has already made this point on several occasions.

IV. No discrimination within the meaning of Article 1, paragraph 1, of Convention No. 111

The Federal Republic of Germany knows no discrimination which leads to unequal treatment in employment or occupation on the basis of political opinion and even less any so-called job bans (Berufsverbote). It is a free democracy in which no one is discriminated against on the basis of his political opinion or membership of a particular political party, also not in the public service.

1. The right to free expression of opinion is guaranteed by our Constitution; the Constitution, specifically article 3, paragraph 3 - like Convention No. 111 - prohibits any prejudice or preference on account of the political attitude of the person concerned. These provisions of the national Constitution are not violated by the protective measures adopted by the Federal Republic of Germany in order to maintain a public service faithful to the Constitution, as the independent Federal Constitutional Court has expressly determined in its basic decision of 22 May 1975 (BVerfGE 39, 334/360 et seq., 367 et seq.).

Instead it is demanded of applicants for employment in the public service, and of officials, that they should recognise the central basic values of the constitutional order in force which secure freedom. For it is the task of all state authority, and thus also of members of the public service, to protect the individual's scope for freedom and his living space. The protection of freedom and human rights cannot be entrusted to their opponents. This agreement in principle with the basic order which the official serves, and not the expression of political opinion or membership of a party, is the connecting link with the duty of faithfulness to the Constitution.

In this connection, it cannot be emphasised strongly enough that the Federal Republic of Germany knows from its own painful experience what it is talking about. Nothing is more dangerous for a free democracy than a public service that distances itself inwardly from that democracy and seeks to destroy it.

On this ground alone it is incomprehensible that the Governing Body Committee should have arrived at a different conclusion with regard to the provisions of Article 1, paragraph 1, of Convention No. 111 which correspond to article 3, paragraph 3, of the Basic Law.

2. Measures to maintain a public service faithful to the Constitution in the Federal Republic of Germany are not connected with the political views of the person concerned. In assessing this statement, freedom of political opinion should not be confused with faithfulness to the Constitution within the meaning of the Basic Law.

In the Federal Republic of Germany every official may hold, profess and seek to give effect to political views which conflict with the policy of the Government. Every official may work actively for a change in the existing political and social circumstances and even advocate a change in the Constitution itself. The limit of the permissible is reached only when goals are pursued which are aimed at destroying human and basic rights and the basic structure of the State which guarantees them. Here any change is prohibited by the Constitution itself, in article 79, paragraph 3, in order to afford secure protection for the basic substance of democracy. If, despite the strict constitutional prohibition, efforts are made to bring about changes in this area, it is no longer a matter of political opinion but a matter of securing a free Constitution. Efforts to bring about such changes no longer have anything to do with "expressing or demonstrating opposition to the established political principles", but serve to destroy the free order and human rights themselves and thus freedom of opinion as well.

3. In this connection the Federal Government refers to the limit which the Committee of Experts itself has set to the field of application of Convention No. 111. The Committee has stated that "even if certain doctrines are aimed at fundamental changes in the institutions of the State, this does not constitute a reason for considering their propagation beyond the protection of the Convention in the absence of the use of advocacy of violent or unconstitutional methods to bring about that result" (see Report III (Part 4A), International Labour Conference, 69th Session, 1983, pp. 204-205 and 218-219). That, however, is the case here.

Since any change in the basic principles and values laid down as unalterable by the Constitution (article 79, paragraph 3, of the Basic Law) is absolutely ruled out, anyone who wishes to abolish those guarantees of freedom is using or advocating unconstitutional methods, for there are no legal methods for that purpose.

4. In this connection it is often contended - for example by the Germany Confederation of Trade Unions in its statement of 27 January 1986 - that the behaviour of a political party hostile to the Constitution and that of its individual members need not be identical. The Federal Government cannot accept this view: this line of thought suggests that a party member may inwardly distance himself from his party's goals. Even in the case of a simple inactive party membership this assumption seems somewhat unrealistic. In the present context, however, this aspect can be disregarded, since in any case mere membership of a party hostile to the Constitution cannot in itself justify dismissal from a relationship of official. In Bavaria there is even a ruling to that effect by the Bavarian State Government dated 19 June 1979.

However, anyone who participates actively in party affairs, exercises functions within the party and takes part in elections as a candidate of his party thereby makes it plain that he wants to fight for its aims and programme and to further their realisation. Any other interpretation would be contrary to common sense, for it would argue that officers and candidates of a party pursued aims and ideas other than those of the party in whose name they acted. Anyone who commits himself to and for a party hostile to the Constitution therefore also pursues its aims hostile to the Constitution.

As a further argument in this connection it is repeated over and over again that the DKP is a "legal party" and that the measures against its members in the public service should therefore be regarded as "illegal".

On this subject the Government of the Federal Republic of Germany would like to make the following clear:

Under article 21, paragraph 2, of the Basic Law, parties which by their objects or the conduct of their adherents seek to impair or abolish the free democratic basic order or to jeopardise the existence of the Federal Republic of Germany are unconstitutional. The constitutionality or otherwise of parties is decided by the Federal Constitutional Court. The court cannot, however, act of its own motion. Instead, under section 43(1), read in conjunction with section 13(2), of the Federal Constitutional Court Act, an application from the Federal Diet (Bundestag), the Federal Council (Bundesrat) or the Federal Government is needed in the case of parties active throughout the federal territory. No such application for a prohibition has so far been filed, so that the DKP, like other comparable parties hostile to the Constitution, can participate in the political life of the Federal Republic of Germany without let or hindrance. Under the legal order of the Federal Republic of Germany it is a matter for the political judgement of the authorities competent to apply for proceedings under article 21 of the Basic Law whether to make such an application or rather to counter a party hostile to the Constitution by political means. No reproach can be addressed to the Federal Government on the grounds that, precisely in the interests of a democratic political exchange of views, it has filed no application with the Federal Constitutional Court for extremist parties to be prohibited as unconstitutional: a prohibition of the German Communist Party would produce no change in the present situation as regards persons employed in the public service, since for the purposes of judging the conduct of those public servants it is of no decisive significance whether the DKP is prohibited or not.

As the Federal Constitutional Court stated in its basic decision of 22 May 1975 (BVerfGE 39, 334/358 et seq.), article 33, paragraph 5, of the Basic Law requires officials to uphold the constitutional order, whereas article 21, paragraph 2, of the Basic Law leaves the citizen free to reject that constitutional order and to combat it politically provided that he does so by generally permitted means within a party which is not prohibited. For the special duties of officials are not laid down with the interests of political parties in view, nor in particular to impede their political activities, but with a view to safeguarding the constitutional State from dangers from among its officials (thus the Federal Constitutional Court, loc. cit.). In view of this clear decision by the Federal Constitutional Court, there can be no question of any ambiguity: an official is not acting constitutionally merely because his party - whose aims he actively supports - has not been formally declared unconstitutional and hence prohibited. On the contrary: the official's behaviour may be held to be unconstitutional even when his party has not been declared unconstitutional in proceedings for its prohibition.

In the light of all that precedes, the Government of the Federal Republic of Germany does not see any discrimination on the basis of political opinion within the meaning of Convention No. 111 in its measures to maintain a public service faithful to the

Constitution. Therefore there is no question of any violation of that Convention.

V. Application of Article 1, paragraph 2, of Convention No. 111

Should the Federal Government's opinion that Convention No. 111 is not at all applicable to the subject of the inquiry not be accepted, a violation would be ruled out in any case on the basis of Article 1, paragraph 2. This paragraph provides that any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

1. The legal duty of officials to be faithful to the Constitution is such an inherent prerequisite for a post in the public service of the Federal Republic of Germany. As has already been emphasised several times, the historical and geographical situation of the Federal Republic of Germany makes it necessary, in defence of the free basic order and the democratic rights of all citizens, to ensure that every servant of the State defends those rights at all times and works actively for democracy. Otherwise he is unsuited for state service as an official. That is the only way in which the freedom of all can be protected against their enemies on the extreme right or left. This is why, as a subjective condition for appointment, the applicant must also furnish a guarantee of conduct faithful to the Constitution, and why every official is under a duty to act for the maintenance of democracy. Correspondingly, the State, as employer, must be able to count on the loyalty of its employees. It must be able to rely on them to identify themselves with its free, democratic order proper to a State based on law and social welfare (see Federal Constitutional Court, *loc. cit.*, pp. 347/348) and to remain faithful to it. Otherwise the State would have to place its trust even in an official who declared of his own accord that he had no confidence in the State (see submission by Mrs. Dorothea Vogt, teacher), employ him, pay him and entrust young people to him for their upbringing.

This principle of the special relationship of trust, the fundamental principle of the legal duty of loyalty of officials to the employer, is certainly to be found in all States of the world and even in the relationship of international organisations to their employees. At the same time it naturally makes a difference whether the duty of faithfulness exists towards an absolute monarch, a totalitarian "Führer" or a democratic, free and pluralistic State. Professor Karl Doehring, in a legal opinion on the question whether existing law and practice in the Federal Republic of Germany to exclude extremists from the public service are in accordance with ILO Convention No. 111, has referred to this point of view and has undertaken extensive research on the subject. The opinion is appended to this statement. The Federal Government points out that even the Staff Regulations of the International Labour Office demand loyalty from the staff (Article 1.4) and require them not to engage in any political activity which is incompatible with the discharge of their duties (Article 1.2). Could, then, a staff member of the International Labour Office engage actively in any movement that was militating to abolish freedom of association and the right to strike, and to impose other limitations on human rights in the world of work, or even to introduce apartheid, without fear of sanctions by his employer?

The question whether the loyalty of officials and concomitant special duties of service are compatible with Convention No. 111 is not of concern only to the Federal Republic of Germany. It is also of considerable importance for all other States Members of the International Labour Organisation. According to the results of the examination, it may also be necessary to investigate whether law and practice in other States are compatible with Convention No. 111. In this connection, the Federal Government would like to refer once again to the considerations set forth at the beginning of its statement: if, despite the specially close ties between employer and officials that characterise every relationship of official, despite the special duties of loyalty and despite the special responsibility of the body of officials for the community at large, Convention No. 111 is of unrestricted application also to officials, then these irrefutable special characteristics must be given consideration at least in the interpretation of Article 1, paragraph 2, of the Convention. Activity as an official would then, as such, be a "particular job" within the meaning of that provision, so that the limitations which of necessity arise out of it for all employees having the status of officials would be covered by that provision. In the Federal Government's opinion, this would be a proper interpretation in the interests of all parties, and the only alternative would be to exclude the applicability of the Convention to officials altogether.

2. In view of the many attempts made by the World Federation of Trade Unions to charge the Federal Republic of Germany with a violation of the fundamental right to freedom of opinion, it should be pointed out once more with reference to the application of Article 1, paragraph 2, of Convention No. 111 that the protective measures taken by the Federal Republic of Germany to maintain a public service faithful to the Constitution are not concerned with the political opinion of the persons

concerned but are aimed at the defence of the free democracy. The frequently quoted remarks of the Committee of Experts on this subject (ILC, 47th Session, 1963, Report III (Part IV), Part Three, Discrimination in respect of Employment and Occupation, p. 192, para. 42) are intended to guarantee to representatives of the political opposition equal access to the public service and continuing employment therein. Exceptions to this rule should be possible only in the case of especially senior positions involving responsibility for the implementation of government policy.

This is taken fully into account in the Federal Republic of Germany. Avowed adherents of parties for the time being in opposition have at all times found employment in the public service in large numbers and have also held top posts in the administration. As will be clear from this, the duty of faithfulness to the Constitution demands not loyalty to the Government of the day and to its policy but, in a totally different sense, loyalty to the State and its free basic order, wholly irrespective of the political convictions with which it is being governed.

This positive attitude to the free democratic basic order that is demanded above and beyond all political views must - as will be further demonstrated - be required of every official, regardless of his function. It is thus a requirement which is inherent in employment as an official, must be met by every official by reason of his function as a guarantor of the free order proper to a State based on law, and therefore falls within Article 1, paragraph 2, of Convention No. 111.

3. In this connection, it is constantly demanded that the application of the protective measures to maintain a public service faithful to the Constitution be differentiated according to the nature of the functions actually performed and, beyond that, according to whether the activity of the official concerned occurred "on duty" or "off duty". The essential points to be made on this are the following:

Under article 33, paragraph 4, of the Basic Law, the exercise of sovereign powers as a permanent task should as a rule to be assigned to members of the public service who are in a relationship of service and faithfulness under public law; in other words, to officials. In the exercise of sovereign powers there can be only uniform rights and duties for all officials. No distinction can be made between officials who must be loyal to the basic values of the free Constitution and others who, despite their status as officials, may behave disloyally with impunity. For the officials together constitute, from the heads of the administration to the countless office-holders at the base, the backbone of the State and at the same time the machinery through which alone the community can exercise its sovereign authority. Enemies of the Constitution who succeed in gaining a foothold here are in a position to undermine the democratic body politic from within in order to destroy it when a crisis arises.

Special requirements as regards the duty of faithfulness are necessary not solely for the holders of particular leading positions in the administration which involve special responsibility for the implementation of government policy. These office-holders, owing to their small numbers and prominent status, always attract the attention of the public and of the political supervisory institutions and are easily interchangeable in the event of a coup; hence they are of less interest for the purposes of planned long-term infiltration of the state machinery.

Of much greater importance for the purpose of attacking the free democratic basic order are precisely the middle and lower positions in the public administration, because they make it possible for a totalitarian regime, without appreciable resistance, to make use of the smooth-running official machinery and thus get the State into its clutches. To prevent this infiltration, which in the Federal Republic of Germany is the declared aim of the extremists of left and right (the so-called "march through the institutions"), loyalty and faithfulness to the Constitution must be required of all officials without distinction. For the same reasons, an official's off-duty behaviour cannot be disregarded. For it is not conceivable that anyone should defend freedom and human rights during working hours and combat them when the working day is over. This eminent significance of prevention has not been fully appreciated hitherto. The Federal Government will come back to it again.

The draft of a third Act to amend the legal provisions relating to officials, dated 27 August 1982, which has been mentioned by the German Confederation of Trade Unions in its statement of 27 January 1986 and by other organisations in this connection, is not in contradiction with this position of principle adopted by the Government of the Federal Republic of Germany.

It was not the purpose of this bill to redefine the content of the duty of faithfulness legally incumbent on officials or to change the legal situation on the subject. Instead, specific indications were to be inserted in the laws governing officials on the basis of the decision of 22 May 1975 of the Federal Constitutional Court which has already been mentioned several times. The following

addition, closely modelled on the wording of the basic decision, was to have been inserted in section 77(1) of the Federal Civil Service Act and section 45(1) of the Civil Service (General Principles) Act - and hence not in regard to the legal duties of officials but in regard to the consequences of a breach of duty: "A breach of the duties incumbent upon an official under section 35(1), third sentence (of the Civil Service (General Principles) Act or section 52(2) of the Federal Civil Service Act) shall be a disciplinary offence if in the individual case a minimum of weight and evidence of a breach of duty is established. In determining whether off-duty behaviour constitutes a disciplinary offence in relation to the duties incumbent upon the official under section 35(1), third sentence (of the Civil Service (General Principles) Act or section 52(2) of the Federal Civil Service Act), the nature and extent of the behaviour and the tasks assigned to the official shall be taken into account. A disciplinary offence shall be deemed to have been committed if the off-duty behaviour cannot be accepted even with due regard for the official's fundamental rights, and in particular the right to free expression of opinion."

All the legal features of these proposed provisions, especially the principle of proportionality and that of evaluation of each individual case, have already been laid down as principles of law by the Federal Constitutional Court in its decision of 22 May 1975. They are thus binding on all state authorities, including the courts.

The principle of proportionality is moreover a fundamental principle of German administrative law and has consequently to be observed, in any case, in all decisions involving a certain margin of discretion or judgement. The definition of the limits of freedom of opinion, which is guaranteed in principle also to every official by Article 5 of the Basic Law, has already been undertaken by the Federal Constitutional Court itself (*loc. cit.*, pp. 366/367).

The "specific indications" contemplated in the bill would therefore perhaps have been debatable, in the Federal Government's opinion, on political grounds; legally, however, they are unnecessary, in view of the clear formulation by the Federal Constitutional Court, which - as is pointed out once again - is directly binding upon the executive and the courts. Consequently the Federal Government did not take this bill any further. In this it was also prompted by concern that the measure might be construed in a manner contrary to its wording, to the effect that the duty of faithfulness to the Constitution applied in practice only to the heads of the official hierarchy and that off-duty behaviour might be disregarded altogether. Such an interpretation would have conflicted with German constitutional law; any such misunderstanding had to be avoided.

4. The majority of the cases included in the inquiry by the Commission concern teachers. The opinion is often given currency that in the specific case of teachers less stringent demands would be sufficient with regard to the duty of faithfulness to the Constitution. The Governing Body Committee, too, evidently comes to this conclusion in its report of 18 February 1985 (see the conclusions, paragraph 40).

The Federal Government would like to counter that contention. The European Commission of Human Rights had the following to say on this problem in paragraph 112 of its report of 11 May 1984 on application No. 9228/80:

112. The Commission takes account of the importance to be attached to the opinion and influence of teachers who, in a free society, have a key role in the development and dissemination of ideas. This is particularly relevant in the present case, where the applicant was a teacher in a grammar school and in daily contact with pupils of an impressionable age and at a stage of intellectual development when the vulnerability of some to indoctrination is a factor which cannot be ignored. In these circumstances the applicant was subject to special duties and responsibilities in relation to her opinions and their expression, both directly at the school and to a lesser degree, as a figure of authority for her pupils, at other times.

Similar remarks appear in paragraph 108 of the Commission's report of 11 May 1984 on application No. 9704/82.

This corresponds to the Federal Government's opinion that precisely employment as a teacher necessitates certain limitations in order to maintain democratic rights to freedom in the long term. In accordance with Article 1, paragraph 2, of Convention No. 111, this cannot constitute discrimination.

It should not be concealed that the European Commission of Human Rights, following the passage quoted above, refers to the special responsibilities of the employer to ensure the free exchange and development of ideas in the context of freedom of expression within the school. As has already been made clear in the foregoing, however, such pluralism of opinions is secured to German schools and indeed is not questioned by anyone. For involved here are not political opinions which differ from those of

the Government, but the fundamental principles of a free democracy.

Or should a person remain a teacher who supplies his pupils with literature in which the frightful crimes of the Third Reich are denied (Luthardt case, Lower Saxony)? Should a person who writes books of extreme rightist content such as *Das Volk in seiner Wirklichkeit* (Kosiek case, Baden-Württemberg) be a teacher at an institution of higher education? Should someone become or remain a teacher who, by standing for election for or holding offices in extremist parties, publicly - and thus also to the knowledge of his pupils - advocates the destruction of the free democratic basic order of the Federal Republic of Germany?

Those who, in this connection, point to the irreproachable manner in which the persons concerned conduct their teaching overlook - even if this claim is correct - that the teacher's authority and the relationship of trust built up in his pupils towards him in the course of his teaching are indivisible: they will be automatically extended to the teacher's "off-duty" ideas. Youngsters who, because of their age and inexperience, can easily be influenced will scarcely be able to distinguish whether the teacher who has their trust makes propaganda for the aims of his anti-constitutional party during lessons or in the street in the afternoon. Precisely this factor makes the education service especially interesting to extremists of all persuasions.

5. Lastly, the preventive significance of the protective measures adopted in the Federal Republic of Germany should also be taken into account. For in order to defend democracy in the Federal Republic of Germany it is not enough merely to react to specific attacks on the free democratic basic order. Officials inimically disposed towards the Constitution may begin by conducting themselves in a manner extremely faithful to it, and only at a time of crisis or conflict, when the State and citizens especially depend on the entire body of officials to stand up with determination for the free state order and the defence of human rights, reveal their true nature and attempt to promote a totalitarian dictatorship. If the State does not counter such dangers in time, it may be too late for any effective defence. Consequently, past behaviour on duty cannot be taken as the sole criterion.

This preventive purpose of the duty of faithfulness to the Constitution does not, however, lead to specific checks on all applicants. As is clear from the "Principles for verification of faithfulness to the Constitution" adopted by the Government of the Federal Republic of Germany on 17 January 1979 and still in force without change, an applicant is in principle trusted to be faithful to the Constitution. Only if the recruiting authority knows of actual facts which indicate that the person concerned does not offer the guarantee that he will at all times uphold the free democratic basic order will the competent authority be asked, in accordance with the principles of proportionality, for any relevant material already in its possession. Even this inquiry does not bring about a purposedesigned check on the applicant. In the case of officials, a specific disciplinary offence is in any event a prerequisite for the institution of disciplinary proceedings.

In the light of all the preceding indications, the Federal Government sees no room for doubting that the protective measures to maintain a public service faithful to the Constitution are justified by the requirements of employment as an official in the public service of the Federal Republic of Germany and therefore cannot be regarded as discrimination within the meaning of Article 1, paragraph 2, of Convention No. 111.

VI. Application of Article 4 of Convention No. 111

Furthermore, a breach of the Convention by the Federal Republic of Germany would be ruled out by Article 4. That Article expressly permits measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State, provided that he has the right to appeal to a competent body established in accordance with national practice.

1. The purpose of the rule laid down in Article 4 is to arrive at a reasonable line of demarcation between the individual's interest in the protection of his human rights which are protected in the Convention and the interests of the State in safeguarding its own security. Here the two points of view stand side by side on an equal footing.

So far as the security of the State is concerned, it must be borne in mind that, while this is a general, indefinite legal concept, it involves reference to circumstances which may vary from one State to another and which are also different in practice. The degree of security which a State enjoys a priori depends on a great many factors, and these must be appraised overall. The conclusion may be that one State should be regarded as appreciably more endangered in its security than another, and this,

naturally, also affects how actions are judged from the standpoint of Article 4 of the Convention.

The factors which must be taken into consideration here include geographical and historical ones. Geographically the Federal Republic of Germany lies - to put it succinctly - on the boundary between East and West. Historically it learned by experience how enemies of freedom misused the freedom accorded them in the days of the Weimar Republic in order to do away with that very freedom. Later on, the Chief of the Gestapo, Heydrich, put it this way: "We ... destroyed by constitutional means, through legal channels, a system which, lacking inner substance, was ready at any time to give itself up if it happened through legal channels" (see *Deutsches Recht*, 1936, p. 121).

What it cost to get rid of that system again, the most recent history has shown. In the summer of 1932 Goebbels wrote in his diary: "Once we have power, we shall never give it up again unless we are dragged out of office as corpses" (Goebbels, *Vom Kaiserhof sur Reichskanzlei*, 1934, p. 139).

From this it will be clear not only why the Federal Republic of Germany has opted for a "democracy capable of defending itself", but also that it is placed in special jeopardy by persons and organisations that are bent on destroying the free democracy. Under these circumstances, measures against members of the public service who actively support the aims of the DKP or the NPD, by holding office in those parties, representing them in parliamentary representative bodies, or standing as candidates for such a position, must be regarded as justified under Article 4 of the Convention even if it is not established that the DKP or the NDP works by unconstitutional means. In the special circumstances prevailing in the Federal Republic of Germany, it must suffice that the NDP expresses itself against democratic fundamental principles and human rights, or that the DKP wants to replace the free democracy by a dictatorship of the proletariat, a people's democracy or any other system of "real socialism".

This will, of course, apply all the more strongly if it is established that the DKP wants to attain its ends by unconstitutional means - for example, because it aspires to amend parts of the Basic Law which, by virtue of Article 79, paragraph 3, are not capable of any amendment.

2. The free democratic basic order is the core of the state and constitutional order of the Federal Republic of Germany. Any attack on that core constitutes prejudice to the security of the State also within the meaning of Article 4 of the Convention.

The concept of the free democratic basic order has been defined by the Federal Constitutional Court and is clear cut (cf. BVerfGE 2, 1/14; 85/140); it has already been mentioned in Section III.

Only someone who, in principle, questions and combats these free basic values, which the International Labour Organisation itself was founded to disseminate and defend in the world of work, and who thus sets himself against the purposes of the International Labour Organisation, is regarded as unsuited for employment as an official in the public service of the Federal Republic of Germany and as falling within the scope of Article 4 of Convention No. 111.

In this matter, the Federal Government considers its opinion to be fully consistent with the remarks made by the Committee of Experts in the general conclusions concerning Convention No. 111 in 1963 (loc. cit., pp. 193/194, paragraph 47).

Reference is once more made to the fact that the examination of each case is prescribed as mandatory by the Federal Constitutional Court. In the Federal Republic of Germany no-one is denied access to the public service, or the right to remain in it, merely because he is a member of a party or an organisation with aims hostile to the Constitution. Instead, each specific case is examined. Every applicant for a post in the public service is the subject of a forecast of his future faithfulness to the Constitution; this forecast is based on his individual activities and his personality, and takes account of membership in a party or an organisation hostile to the Constitution merely as one criterion of judgement among others. In this process, in principle, the faithfulness of each individual applicant to the Constitution is assumed. Only when actual facts have shaken that trust in the individual case may further checks and conversations be undertaken. In the case of an official, a specific disciplinary offence must be proved in formal disciplinary proceedings, and here again membership of a party or an organisation hostile to the Constitution is not enough in itself. Instead specific activities aimed at destroying the free democratic basic order are necessary. However, those activities attack the core of the state and constitutional order of the Federal Republic of Germany and prejudice the security of the State.

This also happens in an unconstitutional manner, because article 79, paragraph 3, of the Basic Law provides for special protection against any amendment of the core of the Constitution that secures freedom (see Section IV above). However, if anyone prejudices the security of the State by individual activities using unconstitutional methods, this, in the opinion of the Committee of Experts, falls within the scope of Article 4 of Convention No. 111. Repeated reference has already been made in this connection to the comprehensive legal safeguards required by that provision.

3. It is objected against the legal position thus taken by the Federal Government that the officials dismissed from the service had not been accused of having used or advocated unconstitutional means. This contention misses the point: any person who knowingly works to eliminate the free democratic basic order, even though the Constitution rules out the elimination of these democratic minimum principles of a State based on law, places himself by that endeavour in conflict with the Constitution. His action is hostile to the Constitution.

In this connection it only remains to add some remarks in amplification:

The Committee set up pursuant to article 24 of the ILO Constitution to examine the representation made by WFTU in 1984 closely connected article 4 with Article 1, paragraph 1, of the Convention. This might lead to a situation in which measures under Article 4 of the Convention to protect the security of the State were permissible only in so far as they were permitted anyway by Article 1, paragraph 1, of the Convention and thus - in practical terms - against totalitarian endeavours that called the entire state system into question, and then only in so far as such endeavours were pursued by violence or unconstitutional means or violence or unconstitutional means were advocated (see document GB.229/5/11, paragraph 44).

The fact that this comment by the Committee of Experts, which related to Article 1, paragraph 1, of the Convention, is picked up again here in connection with Article 4 points to the conclusion that the Committee in question wanted to limit the scope of Article 4 of the Convention in such a way that it would offer States nothing more than what already follows from Article 1, paragraph 1, of the Convention: Article 4 would thus have no practical significance, but be devoid of content.

An opinion leading to the conclusion that Article 4 of the Convention would no longer have any independent legal significance - on the ground that the only action still justified would be action which, already by virtue of Article 1, paragraph 1, of the Convention, could not be regarded as discrimination on the basis of political opinion - would offend the recognised principle of interpretation in international law that for treaties an interpretation is required which takes all provisions into consideration (see advisory opinion of the Permanent Court of International Justice dated 12 August 1922, quoted after Williams/Lauterpacht, Vol. 1, p. 359; Berber I, p. 478; also the codification of this principle of law in Article 31 of the Vienna Convention on the Law of Treaties, dated 23 May 1969).

Only such a comprehensive interpretation of the whole text leads to the "reasonable" construction required by international law (see Permanent Court of International Justice, Series B, No. 11).

To be specific, this means that it is not permissible so to interpret a treaty that individual provisions are meaningless or ineffective. The provisions of a treaty - all of them - must be given by the interpretation a practically usable value (*sens utile*).

The principle is based on an assumption: "It is taken for granted that the parties intend the provisions of a treaty to have a certain effect, and not to be meaningless" (see Oppenheim/Lauterpacht, p. 955, with further references).

This must be all the more true in the present case, since both Conference sessions at which the Convention was discussed dealt at length with Article 4 - preparatory work which under Article 32 of the 1969 Vienna Convention on the Law of Treaties should also be taken into account as a supplementary means of interpretation. Article 4 was inserted during the first discussion on the proposal of the Employers and revised during the second discussion on the proposal of the Workers.

In this connection it is worth mentioning that during the second discussion the Philippines and Polish Government representatives proposed the deletion of what later became Article 4 on the ground that it was superfluous. This proposal was rejected by a large majority (80 votes in favour and 365 against, with 32 abstentions). This makes it clear that the delegates fully recognised the Article as of practical significance; this is confirmed by the fact that, as already mentioned, the text was further amended on second reading (see International Labour Conference, 42nd Session, 1958, Record of Proceedings, Appendix VI, p.

712, paragraph 26).

The history of its adoption, therefore, provides further confirmation that Article 4 of the Convention must have an independent meaning. This, however, is only true if cases arise which, while constituting discrimination on the basis of political opinion under Article 1, paragraph 1, of the Convention and thus per se contrary to the Convention, are nevertheless, by way of exception, permissible under Article 4 of the Convention because the measures affect persons who are engaged in, or justifiably suspected of, activities against the security of the State.

If we take the previous remarks of the Committee of Experts as a guide, such a case might arise if the activity endangering security was not accompanied by the use or advocacy either of violence or of unconstitutional means or methods, so that the activity would not be already prohibited by Article 1, paragraph 1, of the Convention and not protected by the Convention, but the requirements of Article 4 of the Convention in the interpretation given to it by the Committee of Experts were nevertheless met. This would be precisely the case with office-holders in extremist parties - if it were to be assumed that, although they pursued aims seriously contrary to the Constitution (elimination of the free democratic basic order), they did not (for the time being) pursue those aims by unconstitutional means.

In such a case the measures adopted here might possibly not be justified under Article 1, paragraph 1, of the Convention but nevertheless be justified under its Article 4.

Consequently the Government of the Federal Republic of Germany regards its measures of protection to maintain a public service faithful to the Constitution as justified also by Article 4 of Convention No. 111, particularly since provision is made for comprehensive legal safeguards for the persons concerned.

396. The legal opinion by Professor Karl Doehring appended to the Government's statement was dated 13 May 1985. It examined the question whether law and practice in the Federal Republic of Germany for the exclusion of extremists from the public service were in conformity with ILO Convention No. 111, with reference to the report which had been presented to the ILO Governing Body at its 229th Session by the Committee established to examine the representation presented by the WFTU in June 1984. The summary of Professor Doehring's opinion, as set out at the end thereof, is reproduced below, together with certain additional indications contained in the body of the opinion:

1. It is to be presumed that all member States are subject to the same obligations under the ILO Constitution and Convention No. 111. In the light of this principle, there are grounds for doubts when reproaches are made to the Federal Republic for its methods of keeping extremists out of the public service, while communist States protect incomparably more rigorously their one-sided State ideology and the methods used by Western democracies to protect themselves from extremists do not differ fundamentally from those of the Federal Republic. Consequently, to uphold the representation of the WFTU would be discrimination against the Federal Republic.

2. The methods used by the Federal Republic to exclude extremists from the public service are appropriate, are in accordance with free democratic concepts within the meaning of the United Nations Charter and the ILO Constitution, and respect the principle of proportionality. Already in 1930 the social-democratic government of Prussia forbade officials to engage in activities in the NSDAP and the Communist party, although without success. The Constitution of the Federal Republic, based on the experience of the German Reich, does not permit officials to be unwilling to defend the core provisions of the Constitution, the free democratic basic order, or to seek the elimination of those provisions. In the interests of German citizens as a whole an official can be considered fit for that occupation only if he can guarantee his faithfulness to the Constitution. In making its selection among candidates for appointment as officials State authorities must be guided solely by the public interest. Consequently, a decision not to engage a candidate for lack of faithfulness to the Constitution is not arbitrary discrimination, but an appropriate classification.

State authorities can guarantee the democratic State's tolerance of all political attitudes - with the exception of extremist ideologies hostile to the Constitution - only if its officials are willing to defend precisely the political opportunities of a free opposition. A member of the DKP, who is committed to Marxism-Leninism and therefore to a one-party system and the elimination of all opposition, is prima facie not fit to be an official. If, although aware of the objectives of the DKP, he claims to

support the free democratic basic order of the Constitution, his credibility is in doubt. Nevertheless, in such cases there is a specific examination of the individual's aptitude, which provides an opportunity to remove the doubts about his faithfulness to the Constitution. There exist special misgivings, however, if the person concerned has been or is actively supporting the objectives of the DKP. If he does not put an end to these activities, he must be considered to be unfit to become an official.

That the DKP is at present not prohibited attests to the fundamental political tolerance of the legal system of the Federal Republic. Yet it would be an error to infer from this that one may not forbid an applicant for appointment as an official to be a member of that party. If that were so, States that do not have the possibility of prohibiting a party would never be able to exclude extremists and those who oppose the constitution from their civil services. That would, however, conflict with the entire practice of States and cannot be considered a serious proposition.

The removal of an official from the public service presupposes the commission of a breach of duty. Such a breach of duty can exist where an official, despite warning, does not refrain from activities for an extremist party that rejects the Constitution. Such a dismissal is dependent on the decision of an independent court. The burden of proof of the existence of such a breach of duty lies on the State authorities.

An appeal against any decision relating to matters arising under public service law can be made to independent courts; a complaint that fundamental or similar rights have been violated can be addressed also to the Federal Constitutional Court. Moreover, in the Federal Republic, beyond the duty of faithfulness, the extent to which restrictions on freedom of opinion and freedom to engage in political activities are authorised is clearly determined according to functional criteria.

The legal system of the Federal Republic does not permit the imposition of different degrees of faithfulness to the State on officials in different positions. That would be discrimination against officials themselves, which would have intolerable effects contrary to the rule of law in case of transfers, promotions, and on many other aspects of public service law. That does not mean that reliable officials are not to be assigned to security-sensitive areas in accordance with their functions. The qualities of character to be given preference here, however, do not consist of a different degree of faithfulness to the Constitution, but of additional qualities. According to the Basic Law (Article 33, paragraph 4) and the Civil Service (General Principles) Law (section 2(2)) sovereign powers - and generally only such powers - should in principle be assigned exclusively to officials. In doing so, the legal system of the Federal Republic shows that, as a matter of principle, an official is not to be compared to an "employee" in the service of the State, but rather functions as a holder of sovereign power. It would be difficult and under the German legal system also illegal to divide officials into those from whom one can require "a little faithfulness" and those from whom one can require "a lot of faithfulness". The officials themselves have always resisted any such classification. Even a lower official, holding a perhaps not so important position, is proud to represent State authority by loyally exercising sovereign power. It would be discriminatory to give the lower official to understand that his faithfulness is of no importance, only so as to be able to treat equally an official whose faithfulness to the State is open to doubt. Such discrimination would also have very concrete consequences. German public law is based on the assumption that, if necessary, each official must and can replace any other official who is prevented from carrying out his functions.

Part of the special relationship of faithfulness between the State and the official is the duty of the official to accept transfer if he is needed in a different job. This replacement of one official by another must not be thwarted by the fact that an official is not sufficiently "faithful" for the position to which he is to be transferred. In this respect the argument by the Governing Body Committee that in a modern State the public service is in many ways comparable to the private sector is a fallacy and is not relevant for German law. Similarly, the promotion of officials would be affected by dubious considerations if a difference were made between various levels of faithfulness. To have to tell a technically qualified official that he could not be promoted to a higher position because he was not "faithful" enough, and to promote a less qualified official to the position because he was "more faithful" would be to make a distinction that could not be justified under constitutional law. In addition, owing to changing circumstances, an official position may at any time be subject to a change in its significance for the State and security. The "not-so-faithful" official would then have to be transferred.

It would also be incorrect to refer to other legal systems. Every State must be free to organise its civil service law to suit the requirements of its Constitution. When Convention No. 111 was adopted it was known that the public service was organised in different ways in member States and in States parties to the Convention, a situation that Article 1, paragraph 2 of the

Convention takes into account.

3. The systems of government of all democracies comparable to the Federal Republic demand loyalty and faithfulness of persons holding official positions. Thorough studies of these legal systems and their practice have shown that to be the case. Admittedly, the methods of protection vary. That the requirement of equality of treatment is not as strictly observed as in the Federal Republic is attributable to the specific features of other legal systems, among other things, to selection procedures for officials. The high degree of legal protection in the Federal Republic as compared with many other legal systems is shown also by the fact that in comparable legal systems reasons need frequently not be given for not engaging an applicant or even for dismissing an official. The same applies to judicial protection in cases of rejection of candidates and removal from office. There is probably no comparable State that is prepared to give legal and judicial protection in such cases to a similar extent as the Federal Republic of Germany. In other States, in which the reasons for decisions on the constitutional unsuitability of candidates and officials need not be disclosed, the exclusion of extremists, resulting as it does from purely governmental measures, is not spectacular, while in the Federal Republic public procedures bring about full transparency in this field. Hence the public controversy, which is used in an attempt to criticise the legal system and practice of the Federal Republic and to question their legality.

4. The employees of international organisations, too, are under an expressly stated duty of faithfulness to observe the objectives, purposes, and statutes of these organisations. If, contrary to these provisions, an employee were to be engaged or retained who - like a member of the DKP in the Federal Republic - expressly rejected these objectives and purposes of an organisation, not only would the purposes of the organisation be endangered, but the organisation's legal system would be disregarded. The examples of the United Nations and the European Communities demonstrate this point. There also it would be considered intolerable to employ an opponent of the organisation's legal system as one of its office bearers.

5. The one-party system applied in communist States such as the USSR and the German Democratic Republic, which does not tolerate an opposition and which defines basic rights solely as participation in the collective system, demands of and enforces on persons in official positions unconditional commitment to the State ideology, Marxism-Leninism. In these States there is no protection by independent courts. Apart from the fact that such a system is in accordance neither with the principles of the human rights Covenants and Declaration of the United Nations nor with those of the ILO, it is absurd, as is evident from a comparison of the respective legal provisions, that representatives of such Marxist-Leninist systems should criticise the Federal Republic. In communist States the system of protection against non-Marxist public servants is rigorous and complete. That is not to say that for this reason the Federal Republic, too, could take protective measures that violate freedoms. Such measures are not applied. So it is not a question of equal injustice. It is only a question of pointing out that it is intolerable and discriminatory to accuse the Federal Republic of an alleged practice, which, in reality, is applied very intensively in communist States.

6. One has to assume that the concept of discrimination that has been developed in general international law, in the principles of the United Nations, and in the practice of the free democracies underlies also the ILO's legal norms. According to this concept, discrimination signifies disregard of the prohibition of arbitrariness. In other words, one cannot assume that there is discrimination if the distinctions are made on the basis of objective considerations that do not violate freedoms. To that effect, especially the principles of the United Nations Covenants on Human Rights show that it appears objectively necessary to limit the activities of those who want to use their rights to impair the freedoms of others. This is a danger that exists especially among public servants. The choice of protective measures against that danger must be left first and foremost to each State system itself. The particular historical, political and also geographical situation of the Federal Republic is to be taken into account in evaluating the admissibility of its protective measures, a point that was emphasised by the European Commission on Human Rights in a similar context.

7. The provisions of Convention No. III are to be interpreted in the light of these considerations. Such an interpretation, based on the standards of international law and the ILO Constitution, confirms completely the conformity of the Federal Republic's legal system with these principles. It is not arbitrary and therefore not discriminatory to infer from the basically clear text of Article I, paragraph 2, of the Convention that in the Federal Republic all State officials perform a "job" that in view of its "requirements" justifies treatment different from that of typical workers. The degree of that difference in treatment is, by virtue of Article 2 of the Convention, to be determined according to "national conditions", with the consequence that also the special

legal and political conditions of the Federal Republic are to be taken into account. The same principle is again clearly expressed in Article 3 of the Convention. Article 4 of the Convention allows State security to be used as an objective criterion on which to base distinct treatment, if a person is justifiably suspected of endangering such security. A member of the DKP, who in spite of being informed of the incompatibility of Marxism-Leninism with the free democratic basic order of the Federal Republic, sticks to his political conviction and actively manifests it, impairs the security of the State as a State official in any position, as is shown by the numerous cases of espionage and subversive activities directed by communist States.

Accordingly, no violation by the Federal Republic of Germany of the principles laid down in Convention No. 111 can be established. These principles are also fully respected in practice.

397. Following the hearing of witnesses at the Commission's second session, the Government of the Federal Republic of Germany communicated further comments, as follows:

(Translation)

I. As the hearings have shown, a distinction is made between the legal provisions in force in the Federal Republic of Germany concerning faithfulness to the Constitution in the public service and administrative practice. The legal provisions are not being challenged. As the Federal Government already pointed out in its statement of 27 March 1986, none of the socially relevant groups in the Federal Republic of Germany departs from this position of principle. The German Confederation of Trade Unions, as the largest organisation of workers, only recently confirmed once again, in its periodical *Der Deutsche Beamte*, its agreement in principle with the duty of faithfulness to the Constitution for those employed in the public service of the Federal Republic of Germany ("Soviel Freiheit wie möglich, soviel Bindung wie nötig" by Hans-Hermann Schrader, No. 5, May 1986; appended), thus expressing itself somewhat differently from the representatives of two of its affiliates who appeared at the hearings. The Land Government of the Saarland too has not amended the Saarland Civil Service Act, but retains the duty of officials to be faithful to the Constitution. In the international sphere, likewise, it has never been claimed that the duty of faithfulness to the Constitution prescribed in the Basic Law for the Federal Republic of Germany and in the Civil Service Acts of the Federation and the Länder violated per se ILO Convention No. 111. Only administrative practice is always the subject of attack. This overlooks the following:

Either administrative practice is consistent with the legal position, in which case the correct application of existing laws cannot violate the obligations arising out of Convention No. 111 if the laws themselves do not do so; alternatively - and this is what is claimed - administrative practice is not covered by the national laws and is therefore contrary to law; in that case it would be for the national courts to examine and establish this national violation of the law.

The hearings before the Commission of Inquiry have made it clear that a conclusive clarification of the national legal position by the highest court is being deliberately prevented for political reasons. On that account, not only do the persons concerned lack the right to trouble international bodies with such a matter; there is, above all, no specific object for examination. For, if administrative practice were found lawful and in accordance with the laws by the highest national court, the only possible object for international examination would be the laws themselves, because their correct application is inseparably bound up with them. However, the statutory situation in the Federal Republic of Germany has remained unchanged for decades and has not hitherto been regarded by the International Labour Organisation as a violation of Convention No. 111. If, on the other hand, the highest national court were to hold domestic practice to be unconstitutional or contrary to statute law, there would be no further need for these inquiry proceedings.

A decision by the Federal Constitutional Court is therefore a prerequisite for these international proceedings. Such a decision can be brought about only by the persons concerned. Neither the Federal Government nor a Land Government is in a position to apply to the Federal Constitutional Court on the points at issue.

Reference is made explicitly to the explanations given at the oral hearings by Professor Doebling concerning the problem of non-exhaustion of domestic remedies in international law.

II. Differential treatment of extremists of the left and of the right is possible neither under ILO Convention No. 111 nor under the Constitution of the Federal Republic of Germany. However, while German measures against extremists of the right who

seek admission to the public service or are already employed there encounter no criticism in any quarter and indeed are often described as unduly lax (the witness Paech said that in his opinion the human rights safeguards of the Basic Law and of international law did not apply to Fascists), the same measures - despite the principle of equal treatment intended by the ILO Convention - when applied to extremists of the left and in particular to adherents of the German Communist Party (DKP) are alleged to be unconstitutional and to violate international obligations. So it is no longer a matter of whether a special faithfulness to the free democratic basic order may be required of officials in the Federal Republic of Germany and of what consequences are permissible in the absence of such faithfulness to the Constitution; the sole point at issue is whether the Federal Government is right in maintaining that the DKP pursues aims hostile to the Constitution. That question (on which, according to the consistent wishes of the persons concerned who have been heard, the Federal Constitutional Court is not to rule, although competent to do so) cannot be decided on the basis of Convention No. 111. Nor can the Federal Government recognise any reference here to the functions and aims of the International Labour Organisation. Which party or organisation pursues aims hostile to the Constitution at the national level can be determined only in accordance with national constitutional law.

III. At the hearings, reference was made repeatedly to alleged or actual differences in administrative practice in the Federation and the Länder. On this the following may be said:

- 1.** The Federation and all the Länder alike stand by the principle of faithfulness to the Constitution in the public service and are convinced of its necessity. Even the Saarland has not amended the corresponding provisions of its Civil Service Act.
- 2.** Administrative practice is based everywhere on the evaluation of the individual case which the Federal Constitutional Court has made a mandatory requirement, and in which - as in every administrative decision - the principle of proportionality must be respected. Since every individual case presents itself differently, many of the differences which have come to light are due to differences in the circumstances.
- 3.** It should not be disputed, however, that there are in addition some general differences among the individual employers in the Federation and the Länder as regards the practical application of statutory provisions which are the same everywhere, for example with regard to the so-called routine request for information. This is due partly to a subsequent change of view by elements of the Social Democratic Party of Germany (SPD) and partly to the federal system of the Federal Republic of Germany. In their practical effects, however, the varying rules of procedure are less significant than would appear. The most appropriate and effective means of unifying administrative practice would be a decision of the Federal Constitutional Court on the questions which remain at issue: something which is deliberately prevented.
- 4.** In the Federal Government's opinion, only the Constitution and laws of the Federal Republic of Germany and the administrative practice derived therefrom, which coincides with the practice in the majority of Länder, can form the basis for the Commission's inquiry. If individual Länder in individual cases decide otherwise in favour of those concerned for avowed political or even merely tactical reasons, that can have no effect on the question whether the practical application maintained by the Federal Government corresponds to the national legal position and whether that legal position is in conformity with Convention No. 111. Furthermore it should be borne in mind that decisions in favour of those concerned are not subject to any judicial control as to their lawfulness, because the beneficiaries have no cause to appeal to the courts.

IV. Repeated attempts were made during the hearings to portray the measures adopted in the Federal Republic of Germany to maintain a public service faithful to the Constitution as unnecessary and therefore impermissible. It was said that those concerned had not been accused of any breach of duty in the performance of their service; that also in their activities outside the service there had been neither criminal actions nor violent aggressive attacks on the constitutional order; that their conduct had not impaired respect and confidence in a manner significant for their functions or for the prestige of the civil service; that, where persons accused of activities hostile to the Constitution had remained at their posts, no recognisable consequences or prejudice for the free democratic basic order had been discernible; that therefore the persons concerned were not dangerous to the democratic existence of the Federal Republic of Germany; that consequently the duty of faithfulness to the Constitution could not be regarded as an inherent requirement of employment in the public service within the meaning of Article 1, paragraph 2, of Convention No. 111, nor could the application of Article 4 of Convention No. 111 come into play.

Such an approach - as the witnesses called by the Federal Government have already shown - misses the point and disregards the real problems:

1. It misses the difference between reaction and prevention. The Federal Government has always emphasised the preventive nature of the duty of faithfulness to the Constitution and of the measures connected with it. The free democracy in the Federal Republic of Germany can be protected effectively in the long run only if, in possible future crises and situations of conflict, the body of officials is ready without reserve and together to defend the free democratic basic order. Consequently the necessity and effectiveness of safeguards applied for this purpose cannot be evaluated according to whether specific impairments become discernible already now, in the absence of such a crisis situation, wherever officials with a hostile attitude towards the Constitution have been working for a relatively long period or are still working. A system of safeguards cannot be judged before the contingency for which it is designed has arisen.

2. A connection with the conduct - in and out of the service - of the persons concerned is established, not by way of reaction, but by way of prevention as just described. A person who makes it clear by his present activities, say for a party with aims hostile to the Constitution, that the citizens will not be able to rely on him at the crucial moment to defend their free democracy is unfit for the service of the State and cannot become or remain an official. This has nothing to do with "punishment" for a particular course of conduct but is a question of "fitness" for a particular kind of work, namely as an official in the service of the State.

3. It cannot and should not be disputed that the few officials in the public service of the Federal Republic of Germany who are known to be of hostile disposition towards the Constitution at present represent no specific danger to the free democratic basic order. But the interpretation of Convention No. 111 cannot depend on this insignificant number and the consequent slight danger which it presents for the time being. The question whether faithfulness to the Constitution is a permissible element of suitability and a requirement for employment within the meaning of that Convention is not a question of quantity. The measures adopted by the Federal Republic of Germany cannot violate Convention No. 111 when there are 500 extremists in the public service and be consistent with it when there are 5,000 or 50,000 extremists in the public service. In principle, therefore, every single supporter of aims or endeavours hostile to the Constitution in the public service endangers the security of the democratic State. If one waited until the total of such extremist-minded employees represented an acute danger, it would be too late for effective measures.

4. The crucial question is: who is suitable for a post as an official in the public service of the Federal Republic of Germany? What requirements must be imposed as regards suitability for a particular job can be determined only within the framework of the national Constitution. The suitability requirements are based on the job itself if they form a central feature of the corresponding job description as is the case here, where they are prescribed by the Constitution. The International Labour Organisation and its bodies cannot alter or negate the job description developed nationally. They can only measure it as a whole against the principles of Convention No. 111; it is not open to them to establish an independent definition of the national duty of faithfulness to the Constitution and of the requirements pertaining thereto.

A person who has been nominated as an officer, representative or candidate of the majority of a party or organisation having aims hostile to the Constitution and who represents the party programme formulated by the majority and the individual party decisions to the outside world and seeks to bring them to fruition must accept the implications of such conduct and expect to be "taken at his word". Any divergent inner attitude - which would be a deception of the voters - would have to be proved by him in detail with facts. Conduct of the kind described makes the person concerned unfit for employment as an official. In that case it does not matter whether his conduct in the service was irreproachable or whether he has committed criminal acts or used violence outside the service.

5. The question whether parties with aims hostile to the Constitution are prohibited in the Federal Republic of Germany cannot be accorded any importance for the purposes of the inquiry under Convention No. 111. For the questions of law at issue can only be judged, either without regard to the national legal and constitutional position - in which case a party ban imposed under national law is irrelevant to the appraisal of the facts of the case - or with due regard for national law. In the latter case, the provisions of the Basic Law on the duty of faithfulness to the Constitution in the public service and the basic decision on the subject by the Federal Constitutional Court in 1975 are decisive.

6. Article 4 of Convention No. 111 provides expressly that any measures affecting an individual who is justifiably suspected of activities prejudicial to the security of the State shall not be deemed to be discrimination. A similar restriction is contained in Article 10, paragraph 2, of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, which permits certain restrictions on freedom of opinion that are prescribed by law and are necessary in a democratic society, inter alia, in the interests of national security. Interpreting the concept of "national security", the European Commission of Human Rights, in its report of 11 May 1984 on application No. 9704/82, stated:

Furthermore, it is true that the Court has recognised that the defence of democracy is one of the main justifications of restrictions "in the interests of national security", where democratic societies are threatened by highly sophisticated forms of espionage and terrorism. ... The Commission recalls that the present case is not directly concerned with security considerations in their usual sense, but with restrictions on the freedom of opinion and expression of a lecturer and a civil servant. The requirement of loyalty which imposes these restrictions is intended to ensure the protection of the democratic fabric of society and is one of the bulwarks erected in the light of the experience of the National Socialist State in Germany, to institutionalise democratic structures and render totalitarianism impossible in the Federal Republic of Germany. In this sense, therefore, the security of the democratic constitutional system is at issue (paragraphs 79 and 80).

The Federal Republic of Germany considers this as confirmation of its opinion that attacks on the state order and the constitutional order of the Federal Republic of Germany and on the freedoms of citizens guaranteed therein impair the security of the State. Specific acts of violence are not necessary. Consequently measures against this category of persons are justified by Article 4 of Convention No. 111, all the more so since, on the basis of the examination of each individual case required by the Federal Constitutional Court, such measures may be taken only against individuals, who are assured comprehensive legal protection before independent courts.

7. Reference cannot be made in this connection to the so-called "security checks" as obviating the need for a separate examination of faithfulness to the Constitution. Two basically different procedures are involved, distinct in content and in purpose:

The duty of faithfulness to the Constitution applies in principle to every person in the public service, with certain gradations for some of those employed under a labour contract. It is a general service obligation, with the aid of which the free democratic structure of the State is to be safeguarded also for the future. Consequently lack of faithfulness to the Constitution renders the person concerned unfit for state service. He cannot be appointed, and in the event of breach of that obligation he must be dismissed.

In addition there are parts of the administration which are classified as particularly security sensitive, because the activities involved require enhanced secrecy or affect current external and internal security interests. The direct objects of protection here are not the Constitution and the democratic future of the State but particular affairs of State which need to be kept secret and which affect security. Access to such posts is limited to persons who have undergone a special security check. The subject of this check is not so much the faithfulness of the person concerned to the Constitution, which has already been established at the time of his appointment and in principle is expected of all employees; it is much more a matter of whether he also satisfies the increased requirements as regards security, for example, whether he may be open to blackmail (for debt, criminal acts, etc.) or represents a specific security risk (e.g. alcoholism, drug addiction). Here, one is not concerned with service obligations. If an employee does not satisfy these special requirements, he may nevertheless be or remain employed in other sectors of the public service which are not security sensitive to the same degree. The purpose of the security check is not to establish suitability for state service as such but only suitability for highly specific functions.

Consequently it is also wrong to describe checks and transfers related to these special security requirements as "job-ban measures", as the opponents of the free democratic basic order are always trying to do in order to arrive at larger numbers of cases. Otherwise even an official of the defence administration who is moved to a labour exchange on account of alcohol problems would have to be regarded as the victim of a "job ban".

Owing to the much wider range of tests involved in the security check, it would be disproportionate and unwarranted to extend this procedure to all officials, such as teachers, solely in order to determine whether they were suitable for the proposed job

from the standpoint of faithfulness to the Constitution.

V. Since repeated reference was made during the hearing of expert witnesses to the difference between officials and persons employed under a labour contract in the public service of the Federal Republic of Germany, the Federal Government would like to make the following comments:

1. Under article 33, paragraph 4, of the Basic Law, the exercise of sovereign powers as a permanent function is as a rule to be entrusted to members of the public service who are in a relationship of service and faithfulness under public law: that is to say, to officials. It is true that the dividing line between the sovereign area reserved to officials and the area of persons employed under a labour contract in the public service is difficult to draw and is not always consistently maintained.

There are many reasons for this. For instance, it is permissible under budgetary law to employ persons under labour contracts in posts which in the budget are earmarked for officials (though the converse does not apply). Use is often made of this opportunity in the case of contracts for part-time employment, employment relationships of limited duration and cases in which employment relationships allow of a more flexible personnel policy than the relatively rigid relationship of an official, which is meant to be for life. However, persons employed under labour contracts in officials' posts are subject to the same requirements as regards the duty of faithfulness to the Constitution as officials (the Federal Labour Court has expressly ruled to that effect for teachers).

There may also be areas in which officials are employed even though they are not exclusively concerned with the exercise of sovereign powers; this is perfectly permissible under article 33, paragraph 4, of the Basic Law. There are historical and political reasons for this, and it is also due in part to different conceptions of what should be regarded as "sovereign activity".

2. This coexistence of officials and persons employed under labour contracts in the public service of the Federal Republic of Germany, who are not and indeed cannot always be clearly distinguished, is without significance for the questions to be dealt with here. For the aim is not to ascertain what status should be prescribed for particular jobs in the public service, but whether German officials may be required to uphold the free democratic basic order at all times. This element of suitability is a prerequisite for appointment of an official as such, irrespective of the specific function.

If an official should be doing a job which could properly be assigned also to a person working under a labour contract, no argument could be drawn from this against his duty as an official to be faithful to the Constitution, but at most an argument in favour of transferring him or of a reorganisation. Questions of state organisation, however, are not covered by Convention No. 111. Nor can it be the function of the International Labour Organisation to dictate to its member States the proportion of officials in the public service and the areas of administration in which they may be placed.

3. For these reasons there is no force in the objection that faithfulness to the Constitution need not be required from German officials because the same job may also in certain circumstances be performed by persons employed under a labour contract, on whom less severe demands would be made as regards faithfulness to the free democratic basic order. This argument also misses the following point. For persons employed under a labour contract, in contrast to officials, there is neither a career with regular promotions nor the principle that they can be transferred at any time. In principle, therefore, they remain in the job to which they have been assigned, whereas officials, in the course of their professional life, are subject to a continuous process of development as regards functions and rank.

Furthermore a person employed under a labour contract may for serious reasons be dismissed without notice at any time. While any proceedings for protection against dismissal are in progress, he remains outside the public service. On the other hand, an official for life can be removed from the service only through lengthy, formal disciplinary proceedings, during which he remains an official. Consequently the long-term potential for danger is greater by reason of their status in the case of officials than in that of persons employed under a labour contract.

If the present practice in the Federal Republic of Germany concerning the different status groups were regarded as unjustified, then the duty of faithfulness under civil service law would have to be extended to all persons employed in the public service; in other words, the practice would have to be made more severe as a result of these inquiry proceedings.

VI. A few more observations about the number of relevant cases. Even before the witnesses were heard, the Federal Government had supplied the Commission of Inquiry with comprehensive statistical material but had at the same time expressed doubts as to taking account of those numerical data in considering the questions of principle which are at issue. These indications by the Federal Government with regard to the extremely small number of relevant individual cases were strikingly confirmed at the hearings of witnesses.

All the more remarkable, therefore, are the large numbers of cases quoted by the opponents of the free democratic basic order, but not substantiated. Obviously, every "routine request for information" made at the time of appointment is counted by them as a "job-ban measure" irrespective of the result, and also, for example, every hearing and reassignment in connection with security checks although, as has been explained, this has nothing to do with the verification of faithfulness to the Constitution. The purpose of this manipulation of figures is so obvious that the Federal Government refrains from comment.

VII. There are no "job bans" in the Federal Republic of Germany. The Federal Government therefore reiterates its hope that also on this point the International Labour Organisation will support it in its efforts to provide lasting security for a democracy that guarantees freedom and human rights.

398. By letter of 18 November 1986, the Government communicated the following final comments:

(Translation)

In presenting these final comments, the Government of the Federal Republic of Germany wishes to stress once more its support for the unrestricted application of the procedures for the supervision of standards of the International Labour Organisation. The Federal Government has therefore sought, by the means at its disposal, to provide as quickly as possible all requisite factual data for examining the matter before the Commission of Inquiry. The Federal Government also received the Commission in the Federal Republic of Germany in August, and made the necessary arrangements to facilitate the carrying out of its mandate without hindrance.

In the course of the inquiry, the Government of the Federal Republic of Germany has already set out its views comprehensively on several occasions, and has dealt with all elements which in its opinion are legally and factually significant. It trusts that its arguments will be given due consideration, and therefore abstains from repeating in its final comments all that has been said previously. Instead, it will deal in detail essentially with matters which have arisen since the Commission's visit to the Federal Republic of Germany; apart from that, the points which in the Government's view are the most important are recapitulated.

I. As regards the procedure followed by the Commission of Inquiry, the Federal Government has repeatedly pointed to what it considers the improper attribution to the World Federation of Trade Unions of a role similar to that of a complainant, particularly by the presence of its representatives at the hearings of witnesses, and has objected accordingly. It refers in particular to the written statement presented during the first sitting of the hearings of witnesses, on 15 April 1986.

Because of the much greater and far-reaching significance of the appointment of a commission of inquiry against a member country, as compared with the other procedures for supervising the implementation of standards, the observance of due process must be ensured especially in the inquiry procedure. For that reason, particular importance attaches to the principle that the form and course of the proceedings should be foreseeable for the government concerned. That government must be in a position, before proceedings begin, to foresee the likely steps in the procedure, in order not to be surprised by the course taken.

The absence of rules of procedure for proceedings under Article 26 of the Constitution or at least of a compilation of the procedure followed by earlier commissions of inquiry constitutes a general procedural shortcoming. Reference to so-called "established practice" to justify individual steps in the procedure appears highly problematical, if such a "practice" cannot be found in writing at least in an official document of the International Labour Organisation. The "rules for the hearing of witnesses" adopted by the Commission are only one part of rules of procedure, and therefore do not meet the needs for a comprehensive set of rules.

II. By letter of 12 September 1986 the Federal Government transmitted to the Commission of Inquiry two judgements of the European Court of Human Rights dated 28 August 1986 (complaints by Glasenapp and Kosiek against the Federal Republic of

Germany, cases 4/1984/76/120 and 5/1984/77/121). During the hearing of expert witnesses in Geneva, in response to a request by the Federal Government, the Commission decided, at its eighth sitting on 21 April 1986, to take these two cases into account, in so far as the information was relevant to the issues before it.

In the opinion of the Federal Government, that is the case. At first sight, admittedly, the proceedings before the European Court of Human Rights related to two individual complaints - i.e. two specific cases - concerning admission to employment as an official, whereas the inquiry procedure is concerned generally with law and practice in respect of the duty of faithfulness in the German public service and in that connection cases of dismissal from a relationship of official have prominence. A closer analysis of the grounds for the judgements shows, however, that the two decisions have very great significance for the present proceedings.

Both before the European Court of Human Rights and in this inquiry the issue concerns freedom of expression; in each case this has to be judged according to international, not national standards (nationally, as the Federal Constitutional Court has decided, there exists no violation of the basic right to freedom of expression). The Court, by a majority of 16 to 1, has found that it is not a violation of freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights - indeed, that it is not even an interference with freedom of expression - to admit to employment as officials only those whose future faithfulness to the Constitution is guaranteed. The Court has regarded this requirement of faithfulness to the Constitution as an element of personal qualification, as a question of access to the public service, which can and must be regulated by each State under its own responsibility according to its national circumstances. It has expressly found that this requirement of personal qualification cannot in itself be considered incompatible with the European Convention on Human Rights. It is permissible to take account of the opinions and attitude of an applicant to determine whether he possesses the necessary personal qualifications for the employment sought.

The Court has thus accepted the understanding of faithfulness to the Constitution as constantly presented by the Federal Government, in line with the decisions of the Federal Constitutional Court: the mere fact of having a political conviction and the mere fact of making that known can never constitute a violation of the duty of faithfulness. An official must go further and draw consequences from his political conviction for his attitude towards the constitutional order of the Federal Republic of Germany, for the manner of fulfilling his official duties, for his dealings with his colleagues. The duty of faithfulness therefore requires merely that - as stated in the relevant provisions governing service by officials - the official must "offer the guarantee that he will at all times uphold the free democratic basic order within the meaning of the Basic Law".

Discrimination on the ground of political opinion, as ruled out by Article 1, paragraph 1, of Convention No. 111, would certainly be a violation of the basic right to freedom of expression. Inversely, where there is no violation of freedom of expression, there can be no question of discrimination on the ground of political opinion. The position adopted by the European Court of Human Rights supports the view of the Federal Government that Article 1, paragraph 1, of Convention No. 111 has not been violated.

A second point is to be noted. Suitability for a particular employment is determined by its requirements. This calls for the development of a particular occupational profile with corresponding qualifications; that can be done only according to national circumstances and legal provisions, from which may be deduced what qualifying conditions have to be met by applicants for the occupation concerned. Since, according to national constitutional law, the duty of faithfulness is a necessary qualification for all officials, it necessarily falls within the exception clause in Article 1, paragraph 2, of Convention No. 111. Otherwise international bodies would be able to impose on the national legislator what qualifications he might lay down for given occupations.

The question of qualifications is, however, of significance not only for admission to employment and for giving a lifetime appointment to an official on probation and his dismissal from a probationary relationship when he does not meet expectations, on which the European Court of Human Rights had to rule. It also plays a decisive role for maintenance in the public service. Anyone who, as an official, violates his duty of faithfulness to the Constitution and thus makes evident that he is no longer fit for employment in the public service cannot remain in state service. As the Federal Government has already repeatedly indicated, that has nothing to do with a sanction or "punishment" for a particular opinion, but is a logical and obvious reaction to the disappearance of a requisite qualification, which in these cases is, moreover, to be attributed to the persons concerned. In essentials, therefore, cases of admission to employment and of dismissal are alike. In both instances the issue is fitness to work as an official in state service. The fact of taking into account attitude towards faithfulness to the Constitution and the

consequent conduct of those concerned is merely a means for ascertaining such fitness, which also the European Court of Human Rights regards as permissible.

III. In the course of this inquiry it has repeatedly been sought to create the impression that in the Federal Republic of Germany there has since 1982 been an intensification of measures for the maintenance of a public service faithful to the Constitution. The contrary is the case, as is also confirmed by the figures made available to the Commission by the Länder during its visit. The number of disciplinary proceedings too has not risen. The representative of the Federal Ministry of Posts and Telecommunications, for instance, pointed out once more during the discussions on 5 August 1986 that in the Postal Service the investigations which led to formal disciplinary proceedings were all, without exception, begun before 1982.

The fact that, in spite of these known and verifiable facts, the contrary is asserted shows once again how political interests take the place of legal considerations.

IV. The decision of the ILO Governing Body of 3 June 1985 to establish this Commission for a full examination of all significant legal and factual questions related to the duty of faithfulness to the Constitution was taken, inter alia, because the report of the committee which examined the representation of the World Federation of Trade Unions of 13 June 1984 had, in the opinion of the Federal Government, not taken essential aspects into account. Consequently, in conclusion, the central arguments of the Federal Government are recapitulated as follows:

1. Failing the exhaustion of national remedies for determining the individual cases referred to, international bodies cannot deal with the legal issues arising therefrom. As in these cases there exists as yet no generally binding interpretation of national law, they cannot be made the basis for a conclusive evaluation of national practice.

2. The Federal Republic of Germany, in taking measures to maintain a public service faithful to the Constitution, is seeking to defend and promote freedom and human rights. It would be paradoxical if Convention No. 111, which is directed to the same objective, could be misused to hinder the Federal Republic in so acting and to give the opportunity to supporters of a totalitarian system in the Federal Republic of Germany, by means of employment in the state apparatus, to undermine the free democratic State from within. The aims and endeavours of the International Labour Organisation would thereby be transformed into their opposites.

3. As has been decided also by the European Court of Human Rights, the central issue concerns qualification for employment as an official in state service. Someone may become an official only if out of inner conviction he supports the free democratic basic order of the community which he is to serve, is prepared constantly to defend it and acts in that spirit. Anyone who does not satisfy or no longer satisfies this indispensable and obvious requirement for a particular employment in the public service cannot be engaged or continue to be employed. That does not involve discrimination on the grounds of political opinion: every official or applicant to that extent is also treated alike.

4. Article 1, paragraph 2, of Convention No. 111 expressly recognises that distinctions based on the requirements of a particular job are not discrimination. The personal qualification of faithfulness to the Constitution in any event constitutes such a requirement. What is involved here is not a qualification for a particular position, but the indispensable prerequisite for every relationship of official to serve the State and its free democratic basic order and not to seek to combat and to eliminate that order.

5. Article 4 has an independent significance apart from Article 1, paragraph 1, of Convention No. 111. Anyone who wants to eliminate the essential features of the State and constitutional order of the Federal Republic of Germany, which are specially protected by the Constitution as unalterable, acts against the security of the State or its democratic constitutional system. The European Commission and the European Court of Human Rights have regarded it as legitimate for a State to protect itself against an imperceptible slide into totalitarianism and to take precautions against threats to national security and the democratic social and political order (Case of Klaas and others, Series A, Vol. 28, paras. 46ff.). The Federal Government has already referred to this in its comments on the results of the hearings of witnesses, point IV.6. The prospects of success of such endeavours or already verifiable negative effects are not relevant for the application of Article 4 of Convention No. 111.

6. The objective of all measures for maintenance of a public service in the Federal Republic of Germany that is faithful to the Constitution is prevention, the preservation of democracy and thereby of the rights to freedom of all citizens in the future. That is the meaning of the "militant democracy". This aim of securing freedom must not be ignored in the legal evaluation of those measures.

CHAPTER 8

THE POSITION OF EMPLOYERS' AND WORKERS' ORGANISATIONS

399. The employers' and workers' organisations that provided information to the Commission differed on whether the Federal Republic was securing the effective observance of Convention No. 111. Several organisations considered that legislation and current practice were in full conformity with the provisions of the Convention. These organisations were the employers' confederation, the Bundesvereinigung der Deutschen Arbeitgeberverbände; the Deutscher Beamtenbund, which has 800,000 members, mostly officials; the Deutscher Lehrerverband (114,000 members); and the Deutsche Angestellten-Gewerkschaft, which has some 170,000 members in the public services, virtually all of them salaried employees. Several other organisations felt that the manner in which the legislative and other provisions relating to the duty of faithfulness of public servants were currently being applied was not wholly consistent with the requirements of Convention No. 111. These organisations were the International Confederation of Free Trade Unions; the Deutscher Gewerkschaftsbund, whose reply was made in agreement with its public-service affiliates, and, in separate supplementary replies, three of these affiliates: the Deutsche Postgewerkschaft (450,000 members), the Gewerkschaft Erziehung und Wissenschaft (200,000), and the Gewerkschaft der Eisenbahner Deutschlands (400,000). The positions taken by these various organisations are summarised below.

The position of organisations which consider legislation and current practice to be consistent with Convention No. 111

400. The Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA) stated that it had nothing to add to the historical and factual indications previously presented by the Government to show why the requirement of faithfulness to the Constitution of public servants who had the status of officials was not in conflict with Convention No. 111. It also considered the Government's legal and political evaluation to be comprehensive and correct. The BDA made some additional remarks to express the specific views of employers' organisations. It considered as particularly dangerous for the social partners the rejection by the advocates both of communist systems and of neo-Nazi ideologies of a strict separation of powers and an independent judiciary, as well as their endeavour to remove social pluralism in so far as affecting autonomy in collective bargaining and the multi-party system. The BDA observed that the Federal Republic's social partnership was based to no small extent on the fact that in cases of dispute not only labour and social legislation but also uncertain points in labour-management relations could be examined by independent courts. Accordingly the BDA considered the exclusion of representatives of Marxist-Leninist and neo-Nazi ideologies from the public service, the backbone of this constitutional order, to be fully justified, as those ideologies rejected the separation of powers and the independence of the judiciary. The Basic Law supposed the existence of a pluralistic society. The ideologies in question and their practice had inevitably led in the past (National Socialism) and in present times (Communism) to a one-party system. The existence of different interests was denied, differing interests were suppressed; differing views were forbidden, being regarded as "socially pernicious" or "counter-revolutionary". Also the autonomy of trade unions and employers' organisations, which in the Federal Republic was guaranteed in an exemplary manner, was foreign to this view of society. Conflicting interests and autonomous settlements had no place in a State without pluralism. Therefore, in the opinion of the BDA, representatives of such ideologies should not be given the opportunity to undermine these essential elements from within the State.

401. The BDA stated that the Federal Republic, unlike most other countries in the world, allowed also those who opposed the constitutional order to participate in elections and to engage in agitation against that order. It observed that nearly all the other countries in the European Communities had rules similar to those of the Federal Republic, although generally without the obligation for the State to give reasons for its decision to reject a candidate for the public service and without legal protection in such a case. The very extensive legal protection in the Federal Republic should be given greater attention if the inquiry were to include comparisons with other countries.

402. The Deutscher Beamtenbund (DBB) likewise pointed to the legal protection enjoyed in the Federal Republic of

Germany by candidates for the status of official. It stressed that an established official might not be dismissed at the discretion of his superiors. An official for life might be dismissed only as a result of disciplinary proceedings before independent courts.

403. The DBB, as well as the Deutscher Lehrerverband, stated that the duty of political faithfulness constituted an indispensable condition for employment in the public service. The employment in the public service of persons hostile to the Constitution endangered the foundations of the free democratic State and the rule of law. A State that admitted enemies of its Constitution to the public service would abandon itself. No one could be both servant and enemy of the Constitution.

404. In evidence before the Commission, the representative of the DBB (Endnote 149) stressed that one of the distinctive features of the Constitution of the Federal Republic was that it entrusted the exercise of sovereign powers to a special status group, namely, officials. The intention expressed by the Basic Law was clear: all tasks closely connected with the exercise of State powers and with the capacity of the State to function were to be reserved for those State employees bound by a special relationship to the State and its fundamental principles. This "organisational safeguard" of the principles of the Constitution was peculiar to the Federal Republic as compared to other countries.

405. In its written communication the DBB expressed the view that Convention No. 111 could not be used as a standard of interpretation for officials in the Federal Republic, because the duty of political faithfulness was imposed by Article 33, paragraph 5, of the Basic Law; in case of conflict, constitutional law took precedence over international treaties, which under the German legal system ranked as ordinary legislation. The DBB considered that the same applied to contractual employees in so far as the duty of political faithfulness was part of the aptitude required of all candidates for employment in the public service under Article 33, paragraph 2, of the Basic Law. Irrespective of this question, the DBB was of the opinion that Convention No. 111 had not been violated, having regard to Article 1, paragraph 2, and Article 4 of the Convention.

406. The DBB observed that Article 33, paragraph 2, of the Basic Law, under which every German had equal access to any public office according to his aptitude, qualifications, and professional attainments, does not differentiate according to the type of employment relationship; it applies to all applicants for employment in the public service, regardless of whether the relationship to be concluded is to be governed by labour law or is to be that of an official. However, according to the case law of the Federal Labour Court, the degree of political faithfulness that may be demanded of a contractual employee is not in all cases the same as for officials. In the case of salaried employees there is differentiation according to duties, functions in the State, and therefore - within the meaning of Article 33, paragraph 2, of the Basic Law - according to the particular post. A salaried employee in the occupation of teacher, for example, because of his responsibilities and the importance of teaching for the general welfare, has to fulfil the same requirements as an official.

407. The DBB rejects the idea of differentiating the verification of faithfulness to the Constitution in the case of officials according to the functions exercised, because this would violate the law and the Constitution. It considers that the general responsibilities of an official in the administration of the provision of services are not less than those of an official in security-sensitive areas. In his evidence before the Commission, the representative of the DBB (Endnote 150) observed that the smooth functioning of the State infrastructure depended on the conduct of those who actually delivered the services. The "small officials", whether they be engine drivers, postal officials, or municipal employees, were those who, in all public service sectors, have their "hands on the levers". There were, moreover, no evident criteria for grading the duty of faithfulness according to posts and functions.

408. Asked whether any members of the DBB had been the subject of measures to exclude them from the public service on grounds related to their political activities, the DBB representative stated that there had been no cases in recent years, and he knew of no earlier cases. The reason was that the DBB had at an early date decided to refuse membership to members of extremist organisations. Consequently, those who wanted to engage in extremist activities joined other unions that permitted its members to engage in such activities. (Endnote 151)

409. A representative of the Deutsche Angestellten Gewerkschaft (DAG), (Endnote 152) in evidence before the Commission, observed that the State could not be compelled to employ its enemies. Although in normal times they might pretend to respect the Constitution, nobody would be able to rely on them in times of crisis. The identification with the constitutional order was a requirement for appointment as an official, within the meaning of Article 1, paragraph 2, of Convention No. 111. Anyone who

did not in his entire conduct bear witness to his support for the free democratic basic order could also not serve the State faithfully as a contractual employee. In their case, it was not necessary to go so far as to demand a guarantee that they would at all times actively defend that order, as was the case for officials. The purpose, however, was the same. The representative of the DAG pointed out that under Article 33, paragraph 4, of the Basic Law, the exercise of sovereign powers as a permanent function should as a rule be entrusted to officials. That meant that also persons employed under private law might temporarily exercise sovereign powers. For that reason, as well as because of their close relation to the State and its functions, clause 8 of the federal collective agreement for salaried employees required such employees by their entire conduct to bear witness to their support for the free democratic basic order.

410. The representative of the DAG recalled that the Federal Chancellor and the heads of government of the Länder had agreed on 28 January 1972 to a decision that was supposed to promote the harmonisation of the application of the legal provisions concerning the duty of faithfulness to the free democratic basic order. However, the decision had not produced the desired harmonisation. Recently one Land had expressly withdrawn from observance of the decision. All public service employers nevertheless remained bound by the requirements defined by the Federal Constitutional Court in its decision on the matter of 22 May 1975. According to that decision, membership in an organisation hostile to the Constitution was not a sufficient ground for disciplinary action; there had also to be activities within or outside the service. The representative of the DAG did not consider it to be contrary to Convention No. 111 to treat the fact of standing as a candidate for an extremist organisation or party as a decisive factor of doubt as to a person's identification with the constitutional order so as to lead to his exclusion from employment in the public service. The DAG representative said he had no evidence to suggest that the current practice of the administration, controlled by the courts, was excessive. On the contrary, it was less rigid than the letter of the provisions governing civil servants. The numbers of refusals to engage persons and of dismissals in recent years were limited. Various efforts to liberalise the practice had been made such as the new principles for the verification of faithfulness to the Constitution adopted by the Federal Government on 17 January 1979.

411. The representative of the DAG stated that his organisation excluded from membership persons who were members of organisations that intended to eliminate the constitutional order of the Federal Republic. That exclusion applied to right- and left-wing extremist parties. In reply to a question of the Commission, the DAG representative said he was aware of only one case in which a member of his union had been the subject of measures to exclude him from the public service on grounds related to his political activities; it had occurred a long time ago, and the witness did not know the details of the case. (Endnote 153)

The position of organisations which do not consider the situation in the Federal Republic as wholly consistent with Convention No. 111

412. The International Confederation of Free Trade Unions expressed general agreement with the conclusions reached by the committee set up by the Governing Body to examine the representation made under Article 24 of the ILO Constitution (namely, that the duty of faithfulness to the free democratic basic order imposed on officials in the Federal Republic of Germany, by reason of the generality of its scope and as currently applied, goes beyond what is authorised by Article 1, paragraph 2, and Article 4 of Convention No. 111).

413. The Deutscher Gewerkschaftsbund (DGB) communicated a statement made in agreement with those member unions which the Commission had invited to present information. In separate communications, the Gewerkschaft Erziehung und Wissenschaft (GEW), the Gewerkschaft der Eisenbahner Deutschlands (GdED), and the Deutsche Postgewerkschaft (DPG) associated themselves with the DGB's statement, and transmitted certain resolutions or statements adopted by their organisations. Information on a number of individual cases compiled by the DPG, the GEW, and the Gewerkschaft Öffentliche Dienste, Transport und Verkehr (OTV) was subsequently communicated by the DGB. Representatives of the DPG and of the GEW gave evidence before the Commission.

414. The statement communicated by the Deutscher Gewerkschaftsbund was as follows:

(Translation)

The DGB and its member trade unions have followed developments in the Federal Republic of Germany with growing concern.

In 1975 the Federal Constitutional Court rendered a judgement on this question; it laid down principles from which in recent times administrative practice as well as the courts, especially the administrative courts, have increasingly departed.

The social-liberal Federal Government on 16 June 1982 introduced a bill in this connection, which sought, by means of appropriate substantive and procedural provisions, to orientate the verification of faithfulness to the Constitution in accordance with the principle of proportionality and to ensure the individual examination of each case. This was also announced to the ILO Conference.

Since October 1982 we have had a new Federal Government, composed of other political forces. This Government has not pursued the adoption of the draft legislation envisaged by its predecessor.

Under the new Government, the administrative practice of the authorities has become markedly more severe.

After the change of government which resulted from a constructive vote of no-confidence, the SPD group of the Federal Diet (Bundestag) on 27 October 1982 introduced a bill identical to the previous Government bill; however it did not succeed.

As a result of these developments, delegates at recent conferences of member unions of the DGB have protested against discrimination and disciplinary measures on account of political opinions and activity and have called for appropriate measures to be taken.

The Federal Constitutional Court in its leading decision of 22 May 1975 set out in detail its view of the content and scope of the duty of faithfulness to the Constitution owed by officials, namely:

- 1.** The mere fact of holding an opinion and of making this known can never be a violation of the duty of faithfulness imposed on officials.
- 2.** One aspect of the conduct which can be relevant for the evaluation of the personality (of an applicant for employment) may also be the fact of joining or membership of a political party which pursues objectives hostile to the Constitution, irrespective of whether the party has been found to be contrary to the Constitution by judgement of the Federal Constitutional Court.
- 3.** In the case of officials appointed for life, dismissal is possible only if a specific breach of duty has been committed. In this connection, one must take into account that a minimum of weight and evidence of a violation of duties is required to establish the existence of a breach of the duty of faithfulness.

Conclusions:

The foregoing principles do not permit any automaticity or general presumption that the mere membership of a party alleged to have objectives hostile to the Constitution generally justifies doubt as to faithfulness to the Constitution, nor can mere membership, activity or standing as candidate for such a party constitute a breach of duty which would justify the dismissal of an official. This was also the purpose of the above-mentioned bills, which provided that in disciplinary proceedings for violation of the duty of faithfulness to the Constitution based on the conduct of officials outside their service all relevant circumstances should be taken into account and that in particular due regard should be had to the functions assigned to the official and to his right to freedom of expression.

It is to be concluded that, according to these principles, political opinions or convictions alone cannot justify a refusal to appoint an applicant or the dismissal of or other discrimination against established officials.

Administrative practice is increasingly departing from that position.

This is the case above all in the federal administration, for which the Federal Government is responsible, and in the administrations of those Länder of the Federal Republic of Germany in which political authority is exercised by the same political parties as on the federal level.

Those administrations are adopting a purely automatic approach, contrary to the principles laid down by the Federal Constitutional Court (examination of each case individually, overall evaluation of the personality of the official). According to this practice, mere activity for a party considered hostile to the Constitution - even if it is not prohibited - and in quite a number of cases standing as a candidate for public offices on behalf of such a party suffice for dismissal even of a long-serving official appointed for life, even where there is not the slightest ground for doubting the integrity of the person concerned in his work.

In our opinion, this practice can hardly be compatible with ILO Convention No. 111.

From the foregoing, it will already be seen that the DGB and its member unions cannot agree with the comments of the Federal Government on the representation. This follows more specifically from recent decisions of trade union bodies. Thus, the 12th Congress of German officials of the DGB on 27 to 28 November 1985 adopted a resolution on disciplinary measures on account of political activity which had been proposed by the Deutsche Postgewerkschaft (DPG). It reads as follows:

The 12th Congress of German officials decides:

The Federal Council of the DGB is invited, on the basis of the decision of the DGB Federal Committee of 8.6.1977, strongly to press for the final ending at federal and Länder level of the practice of disciplinary measures and destruction of occupational existence solely on the grounds of membership in a lawful political party or of activity for such a party outside the service, and for the rehabilitation of those affected.

The Congress of officials of the DGB also adopted a proposal by the Gewerkschaft Erziehung und Wissenschaft (GEW), worded as follows:

The 12th Congress of German officials decides:

The DGB is invited, in collaboration with its subordinate bodies and member trade unions, to make available to the ILO detailed material based on individual cases for the deliberations of the Commission of Inquiry which is to examine practice under the decree against radicals ("Radikalenerlass") in the Federal Republic and its compatibility with several Conventions of the ILO.

Both proposals were adopted by the Congress of officials by large majorities.

The Government's assertion, in its statement of 18 December 1984 in reply to the representation, that the courts would examine all elements and approve the action of the authorities only if the various relevant circumstances are of general significance, is at least misleading. The same applies to the assertion that in the Federal Republic no one is removed from the public service solely because of his political convictions. On the basis of the decisions of the Federal Administrative Court, there is in fact a purely schematic evaluation. If a political party is considered hostile to the Constitution, the mere fact of being a member of that party and holding office in or being a candidate for that party leads almost automatically to removal from the service. In judging the matter, regard is not had to other acts or statements by the official concerned which are relevant from the point of view of disciplinary law, nor is consideration given to the question whether the behaviour of the party and of the particular member concerned are in fact identical. This approach negates the pronouncement of the Federal Constitutional Court that the holding and stating of a belief can never be a violation of the duty of faithfulness calling for disciplinary punishment. This point has been stressed by one of the judges who participated in the decision of the Federal Constitutional Court of 1975, namely Seuffert, in an article in a legal journal (*Deutsches Verwaltungsblatt*, 15 December 1984, p. 1218).

The Federal Government and the courts accordingly attribute to the party member concerned the entire programme of the party which is considered to be hostile to the Constitution, without entering into and examining the actual conduct of the person concerned. For example, in the judgements concerning the postal officials Meister and Peter, the Federal Administrative Court did not take account of their long period of irreproachable service or of the fact that they had at no time actively pursued the objectives of their party by statements or conduct in their service. The trade unions agree that political views of officials which are not compatible with the free democratic basic order in the Federal Republic should not enjoy protection if violent or unconstitutional means are used or advocated. The mere membership of or candidature for a political party should, however, not be regarded as constituting such conduct, even if the party pursues objectives hostile to the Constitution. In addition there must be specific forms of conduct against the constitutional order, such as agitation or incitement, which have to be proved

against the person concerned and which lead to the conclusion that he actively combats the constitutional order of the Federal Republic of Germany. There was however no question of this in any of the 24 cases of disciplinary measures for political reasons with which, for example, the Deutsche Postgewerkschaft has been concerned. The trade unions too emphasise the obligation of faithfulness to the Constitution for everyone employed in the public service. However, to justify any removal from the service, proof must be required of specific conduct hostile to the Constitution by the person concerned, that is, an activity against the free democratic basic order within the meaning of the Constitution, and not a mere political belief as expressed by membership in or candidature for a party. Here lies the decisive difference as compared with the views of the Federal Government.

415. The Deutsche Postgewerkschaft (DPG) communicated a resolution adopted by its Federal Committee on 21 June 1985, which stated that an appraisal of the conduct of officials or contractual employees in the public service must be based not only on purely formal criteria or merely on active membership in a party considered to be hostile to the Constitution. It must, as required by constitutional law, be based on an examination of each individual case taking account of the personality and the actual past conduct of the individual concerned within and outside his service. In particular - contrary to the case law of the Federal Administrative Court - irreproachable conduct acknowledged by superiors and colleagues should not be swept aside. In a statement addressed to the Federal Minister of Posts and Telecommunications in August 1984, the DPG referred to the decision of the Federal Constitutional Court of May 1975, which prohibited any schematic treatment of officials and ruled that membership of and activities for a party hostile to the Constitution were not a sufficient reason to reject applications for employment in the public service. If this criterion was to be applied to applicants, it ought all the more to be applied to efficient officials with a clean record, some of whom had been in the service for many years. The current measures in the Federal Postal Service did not respect the criteria laid down by the Federal Constitutional Court.

416. In his evidence before the Commission, the representative of the DPG (Endnote 154) observed that if the above-mentioned principles were applied, by administrations as well as by the Federal Administrative Court, then all the cases currently pending known to the DGB would be decided in favour of the individuals concerned, because none of them had been the subject of reproach for his conduct either within or outside his service, other than for his political activities. That would solve the problem before the Commission of Inquiry. The Federal Government and the courts could, without losing face, change a practice that not only the trade unions considered to be damaging. Apart from the opinions manifested in the decisions of trade unions, there was less and less sympathy among the colleagues and superiors of those against whom disciplinary measures were being taken and whose existence was being destroyed. Länder with governments led by the Social Democrats no longer took measures against those in their service solely because of membership of, or candidature or activities for a party considered to be hostile to the Constitution. It was difficult to explain why a particular teacher could not, because of his political activities for the DKP, obtain an appointment in Rhineland-Palatinate, but could become a teacher in the neighbouring Länder, the Saarland and Hessen.

417. The Gewerkschaft Erziehung und Wissenschaft (GEW) attached to its communication several resolutions on occupational bans adopted by the union's Congress of 1983. In a general resolution, the Congress protested against the tendency to undermine the basic rights guaranteed by the Basic Law, and demanded that the exercise of civil and political rights, including membership of and activities for a party or organisation, should not constitute evidence of conduct contrary to the Constitution. All performance appraisals ought to be based on the actual conduct of the individual within the service. Prognoses of an individual's possible future conduct were inadmissible. The offices for the defence of the Constitution should be excluded from the procedures for the engagement and appraisal of officials and salaried employees. Occupational bans imposed and proceedings initiated in violation of these principles should be terminated, complaints and appeals made by the authorities withdrawn, and those already affected rehabilitated.

418. The representative of the GEW, in evidence before the Commission, (Endnote 155) referred to the comment by the Committee set up by the Governing Body to examine the representation made by the WFTU that in the modern State the public service embraced a wide range of functions, many of them unrelated to the administration of the State, such as education, transport and other services of an essentially technical nature. By contrast, an examination of the decisions of the courts in the Federal Republic of Germany showed that particularly strict demands were made in regard to the political faithfulness of teachers. According to a judgement of the Federal Administrative Court of 6 February 1975, teaching comprised duties of great significance for the State because schools had an exceptionally important role in making adolescent citizens aware of the values of the State order and because this responsibility was placed upon each teacher as part of his tasks. The Federal Labour Court

had established a corresponding duty of faithfulness for teachers working as salaried employees. However, teachers too should be entitled to have their own views, distinct from those of the Government or of the majority, which they should also be able to manifest by participation in elections. In practice, contrary to the Federal Constitutional Court's decision of 22 May 1975, there was no real examination of the facts of individual cases or of the personality of the official concerned; reliance was placed solely on activity for a party considered to be hostile to the Constitution, even when there were no factors justifying doubts about the professional integrity of the individual concerned. It would be wrong to consider that the conflict with the provisions of Convention No. 111 was due only to the particular nature of the German law governing officials, all the more because the employment of teachers was increasingly being based on labour-law contracts.

419. Referring to the cases that the GEW had submitted to the Commission through the DGB, the GEW representative pointed out that in none of them was there any allegation of specific misconduct related to the employment relationship. Although in the Eckartsberg case the Lower Saxony Disciplinary Court had decided in favour of the official, this was due to the attitude adopted by the Land authorities in the past; subsequently a circular had been issued to make clear the intention, on the basis of this judgement, to dismiss any official who in future stood as candidate for a party considered hostile to the Constitution. In the case of Rüdiger Quaer, although ultimately he was dismissed, he worked as a teacher for 12 years while the proceedings against him were going on. If such employment had been inappropriate, the authorities could have sought his removal while the proceedings were pending but they did not do so. This showed that the reason for dismissal was Quaer's opinions and their manifestation outside the service and that his conduct within the service did not justify such a decision. A particularly noteworthy point in the case of Friedrich Sendelbeck was that, while proceedings were pending, the legislation in Bavaria had been changed to require preparatory service to be performed solely with the status of official; only these provisions had made it possible to prevent Sendelbeck from completing his training.

420. The Gewerkschaft der Eisenbahner Deutschlands (GdED) communicated resolutions adopted by its Congresses in 1972, 1976 and 1980 relating to the Common Declaration of the Federal Chancellor and the Länder Prime Ministers of 28 January 1972 and the practices resulting therefrom. The 1976 resolution condemned the 1972 Declaration and the occupational bans in the public service which in practice resulted in some cases, as violating the constitutionally guaranteed right that no one should be placed at an advantage or disadvantage as a result of his religion or political opinion (Article 3 of the Basic Law), except where the Federal Constitutional Court had imposed a deprivation of basic rights (Article 18). According to the resolution, the Declaration had the effect of stifling criticism of social conditions and created a general atmosphere of intimidation and opportunism in public administrations and schools. In 1980, the Congress welcomed the decision of 1 April 1979 of the Federal Government to refrain as regards employment in the public service from addressing inquiries to the Office for the Defence of the Constitution as a matter of routine.

CHAPTER 9

THE NUMERICAL IMPORTANCE OF CASES

421. The Government, as well as its witnesses at the hearings before the Commission, emphasised the very small proportion of persons who have been affected by the application of the provisions relating to the duty of faithfulness, in comparison with the numbers employed in the public service. (Endnote 156) Moreover, in submitting statistical information to the Commission, the Government questioned the relevance of such data; whether Convention No. 111 or human rights were being violated did not depend on the number of persons affected.

422. A summary of the statistical information made available to the Commission is set out below, as well as indications given by certain witnesses and other informants concerning the alleged indirect effect of the measures taken in application of the provisions concerning the duty of faithfulness to the free democratic basic order.

Public service employment in general

423. As regards officials at both federal and Länder levels, the Federal Government gave, for the period May 1975 to 1982, figures of 111 disciplinary proceedings against officials for life for violation of their duty of faithfulness, plus 39 cases of dismissal of officials on probation. Of these 150 cases, 90 concerned persons classified as left-wing extremists, and 15 persons

classified as right-wing extremists; in 45 cases information on the political ideology of the persons concerned was not available. The Government added that the number of disciplinary proceedings initiated could not be equated with the number of dismissals. In many cases the proceedings were either abandoned or less severe disciplinary sanctions were imposed.

424. The Government also provided information on the number of persons in the public service who are regarded as extremists, taken from the 1984 report of the Federal Office for the Protection of the Constitution. At the end of 1984 there were 2,220 known left-wing and 256 right-wing extremists in the public service. A majority of those defined as left-wing extremists were members of the DKP, a majority of those defined as right-wing extremists were members of the NPD. The actual number was considered to be substantially higher; thus it was estimated that as many as 3,000 to 4,000 public servants belonged to left-wing extremist organisations. Of the 2,476 known political extremists, 1,080 were officials and 1,094 salaried employees. Of the known left-wing extremists, 221 were in federal employment, 1,473 employed by the Länder (including 1,139 in schools and universities), and 526 by communal authorities. Of the 256 known right-wing extremists, 111 were employed at federal level, 91 by the Länder (including 34 in schools and universities), and 54 by communal authorities.

Employment by federal authorities

425. In information submitted to the Commission, the Government stated that in 1976 four applicants for federal employment were refused because of failure to guarantee faithfulness to the basic order; in 1977 there had been one such refusal; since 1980 no such refusals had occurred. From May 1975 until 1980, no official for life in the direct employment of the federal authorities was dismissed for violation of the duty of faithfulness. In 1981 there were three dismissals on this ground (one official for life, two salaried employees), and in 1984 one further dismissal of an official for life. At the time of the reply to questions in the Federal Diet (July 1985), ten disciplinary proceedings were pending, nine against officials for life, and one against an official on probation.

426. The Federal Disciplinary Prosecutor indicated that in the past ten years there had been an annual average of 12 to 20 pending disciplinary proceedings on account of alleged violation of the duty of faithfulness. Only some of these had led to judicial decisions; in other cases the proceedings were discontinued, because the persons concerned gave up their status of official or because of lack of evidence of any violation of duty. (Endnote 157)

427. The Chief of the Department for Personnel Matters of the Federal Ministry of Posts and Telecommunications stated that since 1978 disciplinary proceedings for a violation of the duty of faithfulness had been initiated against 18 officials. (Endnote 158) In the information submitted by the Deutscher Gewerkschaftsbund (DGB) in January 1986, reference was made to 24 cases of measures arising out of the duty of faithfulness with which the Deutsche Postgewerkschaft (DPG) was concerned. The DPG witness stated that additional cases had arisen very recently in which members were being questioned about membership of the DKP. (Endnote 159)

428. Of the 73 documented cases brought to the attention of the Commission, 20 concern federal employment. Most of them have arisen in recent years and are still pending. All but four of the federal cases concern public servants in the postal and telecommunications service. Two cases concern officials of the Federal Railways, one a customs official, and one a person dismissed from employment in the social security administration.

Länder employment

429. According to the information provided by the Government, in the years 1980 to 1982 there were 96 cases of refusal to admit applicants to employment at Länder level for failure to guarantee faithfulness to the basic order.

430. Of the 73 documented cases brought to the attention of the Commission, 53 concern employment by Länder authorities. The following statistical data are available for individual Länder.

431. Baden-Württemberg. In his evidence before the Commission, the representative of the Land authorities stated that from 1979 to 1985 there had been 256,000 inquiries about applicants for employment to the Office for the Protection of the Constitution in the Ministry of the Interior, which had transmitted information in 412 cases. As a result, 44 applicants had been

rejected. In the same period there were 12 cases of dismissal in application of the provisions relating to the duty of faithfulness. (Endnote 160)

432. Of the documented cases brought to the attention of the Commission, 11 concern persons employed or seeking employment in Baden-Württemberg. During the hearings, the WFTU representative handed over a list, received from the "Koordinierungsausschuss der Bürgerinitiativen gegen Berufsverbote in Baden-Württemberg", of 30 teachers refused employment in Baden-Württemberg, with brief descriptions of 15 of these cases. Only two of them are among the documented cases received by the Commission.

433. In its meeting with representatives of the Baden-Württemberg branch of the Gewerkschaft Erziehung und Wissenschaft (GEW), the Commission received figures based on the number of cases in which the GEW Land section had been asked for legal assistance. In 1986 (up to August) there had been no new cases. In 1985 there were five new cases concerning officials and one case of an applicant for a position of tutor in a university. In the years 1982 to 1984, there had been eight, six and three new cases respectively. Eleven cases from before 1982 were still pending.

434. Bavaria. Written information provided to the Commission shows that, from 1979 to 1985, 141,983 inquiries were made to check upon applicants. In 492 cases this resulted in information being transmitted to the employing authority; 39 applicants were rejected. Thirty-two of these rejections were definitive. In a further 11 cases applicants for the preparatory service for lawyers were refused admission with the status of official, but admitted under another relationship. As regards persons already in the service, information was transmitted to the employing authority in 46 cases in the same period. Disciplinary action was taken in nine of the 35 cases on which information on the measures subsequently taken is available. In one of the nine cases the disciplinary measure imposed was dismissal. Two cases were still pending.

435. Of the documented cases before the Commission, ten concern the refusal of employment or refusal of admission to preparatory service with the status of official in Bavaria. In most of these cases the grounds for the measures were not membership of the DKP, but activities in various organisations held to be influenced by the DKP (Association of Democratic Lawyers, German Peace Union, pacifist organisations, socialist student association).

436. Lower Saxony. Of the documented cases before the Commission, 16 concern disciplinary proceedings against public servants, and another three a refusal of employment in Lower Saxony.

437. The witness representing the authorities of Lower Saxony provided detailed statistics regarding the application of the provisions concerning the duty of faithfulness from 1972 to 1985. (Endnote 161) These statistics can be summarised as follows:

Applicants for employment (in round figures)

Number of inquiries to the Office for the Protection

of the Constitution 146 000

Number of cases of information provided by that Office 12 000

Information regarded as serious 700

Favourable decisions for applicant after hearing

by committee 360

Applications rejected - doubts re faithfulness 140

Applications withdrawn 100

Applications not accepted for other reasons 100

Judicial proceedings taken by rejected applicants 86

(78 persons; in 8 cases complaints to Labour

Court as well as Administrative Court)

Court proceedings completed: 79

rejection upheld 65

rejection annulled/applicant employed 14

Disciplinary proceedings for violation of duty of faithfulness

Number of cases 263

Dismissals (officials - 33; salaried employees - 26) 59

Decisions in favour of official or lesser measures 81

Still to be decided 25

Termination of employment for other reasons 98

438. The figures submitted show that the years with the largest number of rejected applicants were 1975 (21 rejections) and 1976 (34 rejections). From 1980 to 1985, there was a steady decline in the number of rejections; from 15 in 1980 to two in 1985. However, the rejections refer to decisions that have become finally effective, and thus do not include cases in which the decisions of the authorities have been challenged in the courts and a final decision has not yet been given. Asked by the Commission why the number of rejected applications in the mid-eighties was lower than it had been in the mid-seventies, the witness representing the Land authorities stated that the procedures had become less strict; furthermore, there were no longer extremists of a certain type, particularly those belonging to Maoist groups. (Endnote 162)

439. The figures provided did not give a breakdown by year for disciplinary proceedings. However, prior to 1981 activities such as holding office in the DKP or standing as a candidate at elections were not regarded by the Government of Lower Saxony as justifying disciplinary measures, but since 1981 a stricter policy has been followed in enforcing the provisions on the duty of faithfulness. (Endnote 163) At its meeting with the Land authorities during its visit to the Federal Republic, the Commission was told that disciplinary proceedings were pending in 24 cases. Eighteen cases fell within the competence of the Ministry for Education, of which two concerned right-wing extremists, one a member of the KBW (Maoist), and 15 DKP members (of whom 13 were officials and two salaried employees).

440. Rhineland-Palatinate. Figures received from the Land authorities show that from 1979-85 inquiries about 63,664 applicants for employment were addressed by Land and communal administrations to the Office for the Protection of the Constitution, which provided information in 237 cases. This led to the subsequent rejection of 28 applications for public service employment. Between 1973 and 1985, 31 applicants rejected by the Land authorities appealed to the courts; with success in seven cases and with the proceedings ending in a settlement in two cases. The authorities indicated that from 1982 to 1986 disciplinary proceedings had been initiated against five public servants, all in the education service. One of these cases had been concluded by a court decision; one case ended in a settlement when the person concerned, an official on probation, showed by his conduct that he had dissociated himself from the organisation hostile to the Constitution; proceedings were pending in the three other cases.

441. Hessen. Figures handed over to the Commission by the Land authorities, which cover the years up to 1982, show a decline in the number of inquiries to the Office for the Protection of the Constitution, as well as of cases in which that Office had transmitted information. The decline came after the Land abandoned the practice of routine inquiries about all applicants in

1979. The number of inquiries dropped from an average of about 16,000 a year in the years 1976 to 1978 to about 440 in 1981 and 170 in 1982. The number of cases in which information on the persons concerned was communicated dropped from about 1,000 a year in 1976 to 1978 to 33 in 1981 and five in 1982. From 1978 to 1982 a total of 47 applicants were rejected. The Land authorities told the Commission that there had been no further rejections in recent years. The number of dismissals declined from six in 1976 and 1977 to one in 1980. There were no dismissals in 1981 and 1982.

442. North Rhine-Westphalia. As in Hessen, there was a sharp decline in the number of inquiries about applicants addressed to the Office for the Protection of the Constitution after abandonment, in 1980, of the practice of routine inquiries. In the years 1976 to 1979, the number of inquiries ranged from 43,581 to 53,626. It dropped to 27 in 1980, to seven in 1982 and to three in 1983 and 1984. The Land authorities told the Commission that a decision not to address, in any given case, an inquiry to the Office in question meant that the employing department had no doubts about the applicant's faithfulness to the Constitution. On the other hand, a decision to make an inquiry did not necessarily result in rejection of the application for employment. Since 1980, virtually no applicants had been rejected by the Land authorities. The authorities also stated that, since the end of 1981, disciplinary proceedings had been initiated in only one case: a professor, who held high party office in the NPD and had agitated against foreigners. Proceedings were pending before the court of second instance.

443. Saarland. Here also the trend in figures reflects the changes in the Land Government's practice. From 1972 to 1979 there was a total of 16,880 inquiries. From 1980 to 1985, after the Government had abandoned routine inquiries, there was a total of five inquiries. Since 1985, when the Government revoked the guide-lines for the verification of applicants, there has been no inquiry. In the period up till 1985 as well as since then no applicant has been rejected. There have also been no proceedings against public servants on political grounds in Saarland.

444. Information received from two other sources may be mentioned. The witness from the GEW indicated that from 1971 to 1980 the GEW had given legal assistance in 1,427 cases of refusals of applicants on political grounds and in 55 cases of disciplinary proceedings. He did not have figures for the period after 1980. He felt that they would show a declining trend, largely because of the decrease in the number of teachers being engaged. (Endnote 164)

445. The "Bürgerinitiative gegen Berufsverbote", Freiburg, supplied the Commission with descriptions of some 600 cases concerning applicants as well as active public servants. Some cases are shown as having been finally decided in favour of the individual concerned; others as having been decided against him or as still pending. In 136 cases the relevant decisions have been taken since the adoption in January 1979 of the revised federal principles for verification of faithfulness to the Constitution. In 118 other cases, although initial decisions date from before that time, further decisions or developments such as court judgements have occurred since 1979. A comparison between these two groups shows an increase in the number of cases in recent years in the postal and telecommunications service and in Lower Saxony, and a marked decline in Hamburg and Hessen and, as regards cases initiated by Land authorities, in North Rhine-Westphalia. For the most part, the cases described concern the DKP or its ancillary organisations. However, these case descriptions also indicate that a large proportion of cases in Bavaria concern other organisations, considered by the authorities to be influenced by the DKP, even though a majority of their members do not belong to the DKP.

Further considerations

446. One of the witnesses who appeared before the Commission stated that, although in the Federal Republic the authorities were under an obligation to disclose the reasons for rejecting an applicant, there were, as in other countries, probably also cases in which the true - political - reasons were not disclosed. (Endnote 165) The GEW witness believed that the incidence of such "disguised" rejections had probably increased in recent years; in contrast to the situation before 1980, it was no longer possible to give employment to all those qualified as teachers, and it was therefore easier to give other reasons for not accepting applicants. That would tend to reduce the number of cases in which political grounds were invoked for refusal. (Endnote 166)

447. Reference was also made to a "grey zone" of cases in which those concerned had preferred not to make their difficulties known so as not to damage prospects of obtaining employment elsewhere and avoiding other consequences of being identified as an enemy of the Constitution. (Endnote 167)

448. Several witnesses who appeared before the Commission referred to the deterrent effect of measures for the enforcement of the duty of faithfulness. They observed that measures of exclusion from the public service on political grounds not only punished individuals by depriving them of their occupational existence, but also deterred many others from engaging in political activities. (Endnote 168) The witness representing the Deutsche Angestelltengewerkschaft (DAG) referred to the deterrent effect of the practice of addressing, at a specified point in the engagement procedure, inquiries to the Office for the Protection of the Constitution as a matter of routine about all applicants, not only those suspected of not providing a guarantee of faithfulness to the Constitution. Although he himself favoured a more liberal procedure, he said that that practice could be defended as a preventive measure to keep persons hostile to the Constitution out of the public service. (Endnote 169) The witness representing the authorities of Bavaria denied that young people and serving officials were being intimidated by the practices. He said that, irrespective of their political opinions, public servants were greatly over-represented, for example, in Parliament and among office holders in all the democratic parties. Officials also engaged in protests against State decisions, such as the construction of nuclear generating or reprocessing plants in Bavaria. As long as elementary democratic rules and a certain form of expression were respected, there was no objection to this for reasons related to the laws governing officials. (Endnote 170)

CHAPTER 10

FINDINGS AND RECOMMENDATIONS

449. Pursuant to article 28 of the ILO Constitution, the Commission has to state its findings on all questions of fact relevant to determining the issues before it, to examine whether the facts so found show compliance with the obligations assumed by the Federal Republic of Germany under Convention No. 111 and, in so far as any insufficiencies appear to exist in securing the observance of the Convention, to formulate recommendations on the steps to be taken to correct them.

450. It appears appropriate, in the first instance, to recall the origin of the present inquiry and its implications for the nature and scope of the inquiry, and also to examine certain procedural questions which have been raised by the Government of the Federal Republic of Germany.

Origin and scope of the inquiry

451. The present inquiry had its origin in a representation made by the World Federation of Trade Unions under article 24 of the ILO Constitution. That representation was examined by a tripartite committee of the Governing Body in accordance with the relevant Standing Orders. At the stage of examining the report submitted by that committee, and in the light of comments upon the report by the representative of the Government of the Federal Republic of Germany, the Governing Body, in application of Article 10 of those Standing Orders, decided to refer the matter to a Commission of Inquiry, in accordance with article 26, paragraph 4, of the ILO Constitution.

452. Several consequences follow for procedural purposes from the above-mentioned sequence of events. In the first place, the report of the tripartite committee remains a document which had been submitted to the Governing Body but on the substance of which the Governing Body has taken no decision. Secondly, according to Articles 3(3) and 7(3) of the Standing Orders governing representations, the proceedings relating to the examination of the representation are confidential; in particular, the report of the tripartite committee remains a confidential document. Thirdly, in the view of the Commission, its task under article 26 of the ILO Constitution was in no way that of an appellate body to review the work of the tripartite committee of the Governing Body. The Commission has had to undertake *de novo* a thorough examination of the issues raised in the representation, on the basis of all the means of investigation available to a commission of inquiry.

453. The Governing Body referred to the Commission "the matter" raised in the representation made by the WFTU. Having regard to the allegations contained in that representation, the purpose and scope of the present inquiry has been to determine whether, contrary to the provisions of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), there exist in the Federal Republic of Germany discriminatory practices on the basis of political opinion against public servants and persons seeking employment in the public service, by virtue of the provisions concerning the duty of faithfulness to the free democratic basic order.

Role of the World Federation of Trade Unions in the procedure

454. The Commission notes that, in its final comments presented in November 1986, the Government of the Federal Republic of Germany once more referred to the objection which it had made, in particular during the first sitting of the Commission's second session, to the role which the WFTU had been permitted to play in the procedure. In this regard, the Commission refers to the explanations given in the letter addressed by the Chairman to the Government's representative on 28 February 1986 and to the Commission's ruling on the matter during its second session. (Endnote 171)

The evidence of individual cases and the Government's objection that judicial remedies available on the national level have not been exhausted

455. As indicated in Chapter 6, the Commission received information on a substantial number of individual cases of persons affected by measures or proposed measures of exclusion from the public service, supported in many instances by detailed documentation, including particulars of proceedings in and judgements given by courts at various levels. The Government of the Federal Republic has pointed out, however, that so far there has been only one relevant decision of the Federal Constitutional Court, the so-called "Radikalenbeschluss" of 22 May 1975. That judgement left open a number of issues on which the decisions in individual cases may depend. The Government has observed that those activists of the German Communist Party (DKP) whose cases were relied upon by the WFTU had deliberately refrained from exhausting domestic remedies, in particular by not complaining to the Federal Constitutional Court. The fact that it had been considered preferable in such cases not to submit complaints to the Federal Constitutional Court was confirmed by several witnesses who appeared before the Commission. (Endnote 172) The Government has, moreover, quoted statements by a member of the executive committee of the DKP published in January 1986 declaring that the party's aim was to achieve the removal of existing restrictions on employment in the public service by political means, not by recourse to the Federal Constitutional Court. The Government considered that, in these circumstances, the cases of the persons in question ought not to be taken into consideration by the Commission and that it was a misuse of international supervisory procedures intentionally, for political reasons, to invoke them directly without recourse to the highest national judicial instances.

456. The Commission noted, in the course of the inquiry, that various aspects of the application of the relevant legal provisions in the Federal Republic of Germany (including the Federal Constitutional Court's decision of 22 May 1975) remain open to divergent interpretations and in practice have given rise to divergent approaches and decisions by public authorities as well as by courts. In these circumstances, further examination of the whole question by the Federal Constitutional Court might have provided a useful opportunity for clarification of the law in terms of the rights and principles enshrined in the Basic Law of the Federal Republic of Germany. The Commission notes, however, that on four occasions in recent years when applications were made for submission of constitutional complaints arising out of exclusions from the public service on account of political considerations (in three cases by officials on probation and in one case by an official dismissed from an appointment for life), (Endnote 173) the Court declined to consider the complaints, on the ground of insufficient prospects of success. The Court observed that the examination of the merits of individual cases was a matter for the competent courts and that the Federal Constitutional Court might intervene only if there was a violation of constitutional law. It considered that the circumstances of the cases which were the subject of the applications did not reveal a breach of provisions of the Basic Law. In these circumstances, it is not clear whether recourse to the Federal Constitutional Court on the matter under consideration is still a remedy which in practice remains available to those affected.

457. The Commission observes, moreover, that in contrast to other international procedures - such as those provided for in the Optional Protocol to the International Covenant on Civil and Political Rights or the European and American Conventions on Human Rights - the representations and complaints procedures provided for in the ILO Constitution lay down no condition that local remedies must first be exhausted. The principal reason for this situation is that these ILO procedures may be initiated by entities who need not have any direct interest in the matters at issue - in the case of representations, by any employers' or workers' organisation (national or international), in the case of complaints, by another ratifying State, by any delegate to the International Labour Conference or by the Governing Body of its own motion. The rights accorded by articles 24 and 26 of the ILO Constitution to initiate the examination of allegations of non-observance of ratified Conventions are not based on the traditional notion of action by a particular State for the protection of the interests of its citizens, but provide a means of obtaining such an examination as a matter of general public interest. (Endnote 174)

458. There is a further reason why a precondition of exhaustion of local remedies should not apply to these ILO procedures. Articles 24 and 26 of the ILO Constitution provide for examination of allegations that a State has failed to secure the effective observance of a Convention to which it is a party. Such proceedings are not concerned to pass judgement, or to review national decisions, relating to individual cases. They are aimed at examining whether given situations are compatible with the provisions of Conventions ratified by the country concerned. In such an examination, individual cases are merely items of evidence. Obviously a Commission of Inquiry is still concerned to consider what weight to attribute to any particular evidence. Isolated or contradictory court decisions may not have significance. The position is very different where a Commission is informed of a whole series of decisions, a number of which have been rendered by superior instances (such as the Federal Administrative Court in the present inquiry) and which at least at that level are of a generally concordant nature. In such circumstances, the Commission is able to draw conclusions, firstly, as to the precise effect of relevant legislative texts and, secondly, as to administrative practice in the matters before it.

459. It is appropriate to recall that the requirement laid down in article 19 of the ILO Constitution for a State to "make effective" the provisions of any Convention which it has ratified implies not only the obligation to ensure that the law is in conformity with those provisions but also to ensure that practice is consistent with them. In the case of the Discrimination (Employment and Occupation) Convention, the obligations of the Government of a ratifying State are even more specific. According to Article 2, the Government must pursue a national policy designed to promote equality of opportunity and treatment in employment and occupation and to eliminate any discrimination in respect thereof. Under Article 3, it must (amongst other things) pursue the policy in respect of employment under the direct control of a national authority and modify any administrative instructions or practices which are inconsistent with the policy. These provisions require the authorities to play an active role in working towards the attainment of equality of opportunity and treatment. Individual cases provide evidence from which conclusions may be drawn as to whether the conduct of the competent public authorities is compatible with their obligations.

460. In the present case, it may be noted that the authorities themselves have drawn conclusions from the existing court decisions to determine their policy and practice as regards the application of provisions prescribing the duty of faithfulness for persons employed in the public service. Thus, the Government of Lower Saxony issued a circular in November 1985 to make it clear to all officials, on the basis of the judgement of the Lower Saxony Disciplinary Court in the Eckartsberg case, that standing as a candidate at elections on behalf of the DKP constituted a serious violation of the duty of faithfulness which would lead to the initiation of disciplinary proceedings. Similarly, the systematic suspension, with reduction in pay, of postal officials against whom disciplinary proceedings are pending has been justified on the ground that the judgements of the Federal Administrative Court in the Peter and Meister cases constitute settled case law, in the light of which one must expect that the proceedings now pending would lead to dismissal. Such suspensions have consequently been maintained even after judgements by the Federal Disciplinary Court in the official's favour. In the Parliamentary debate in January 1986, the State Secretary of the Federal Ministry of the Interior likewise referred, as justification for the policies and practices of the authorities, to the fact that the legal situation with regard to the duty of faithfulness was unambiguous in view of the case law established by the Federal Administrative Court and the Federal Labour Court.

461. It would not be proper for a Commission of Inquiry to disregard all such information on the ground that proceedings had not yet been concluded or because one possible avenue of redress - a complaint to the Constitutional Court - had not been sought. The Commission notes that in numerous cases proceedings have been pursued through the whole hierarchy of administrative or labour courts. (Endnote 175)

462. It is of interest to refer to the position taken by other ILO supervisory bodies on the question of the exhaustion of local remedies. The Governing Body committee which examined the representation made by the International Confederation of Free Trade Unions in 1977 against the Government of Czechoslovakia in respect of Convention No. 111 observed that the question raised did not concern the formal compliance of the relevant legislative provisions with the Convention, but determination of whether measures taken against workers under those provisions were consistent with the protection laid down in the Convention. The committee based its conclusions on a series of documents (notices of dismissal and correspondence and other documents arising therefrom) submitted in support of the representation. These documents included the texts of three judgements of courts of first instance. (Endnote 176) In its comments on the representation, the Government of Czechoslovakia observed, *inter alia*, that a worker who felt that his rights had been violated could bring an action before a court; legal

proceedings constituted a guarantee for the application of the Convention, and some workers had used that possibility.

(Endnote 177) Although in most of the cases included in the documentation submitted to the committee there was no evidence of recourse to legal proceedings and the three judgements supplied were only by a court of first instance, the committee, on the basis of that documentation, which provided evidence of a pattern of policy and practice by employing authorities, concluded that the measures taken were the result of the expression of political opinion within the protection of the Convention and that the Government's statements were not an adequate response to the specific allegations. Had the committee, in the light of the Government's statements concerning the available avenues of judicial redress, applied a requirement of exhaustion of local remedies, it would have had to disregard the entire set of documents at its disposal, and could not have reached the conclusions which it did.

463. A more recent case concerned a representation regarding the application of Convention No. 111 by Norway. It related to the effect of legislative provisions dealing with equality in employment. The documents submitted included a judgement of a court of first instance. The Governing Body committee which examined the matter observed that it "is not faced with the task of commenting on the outcome of this case except that the judgement is instructive in indicating the way in which (the relevant legislative provision) has been applied in practice". (Endnote 178)

464. It may also be noted that certain inquiries under article 26 of the ILO Constitution have related essentially to the existence of practices, such as methods of recruitment in the inquiry into forced labour in Portuguese Africa (Endnote 179) and the use of coercion and malpractices in the payment of wages in respect of plantation labour in the Dominican Republic. (Endnote 180) In these cases no attempt had been made to seek judicial redress against the alleged abuses, and no suggestion was made that the allegations should on that account not be considered. In both cases, the Commissions placed special emphasis on the responsibility of the Governments to ensure, by effective methods of supervision, that legislative standards aimed at implementation of the Conventions were observed in practice. (Endnote 181)

465. The Government of the Federal Republic has itself referred to the practice of the Freedom of Association Committee of the Governing Body. In the case mentioned by the Government, that Committee observed:

The Committee has pointed out on many occasions that, while in view of the nature of its responsibilities it cannot consider itself bound by any rule that national procedures of redress must be exhausted, such as applies, for instance, to international arbitration tribunals, it must have regard, in examining the merits of a case, to the fact that a national remedy before an independent tribunal whose procedure offers appropriate guarantees has not been pursued. (Endnote 182)

The particular case in which this comment was made concerned an allegation of anti-union discrimination affecting a single trade union officer. There were contradictory explanations by the complainant organisation and the Government, and no use at all had been made of the procedures available at the national level. An earlier case in which the Committee had similarly taken into consideration the failure to use national procedures related to an allegation of irregularities at a particular election in a trade union federation. (Endnote 183) It will be noted that these cases involved not general situations, policies or administrative practices, but isolated incidents affecting a specific individual or a specific organisation, and that no use at all had been made of available national remedies.

466. It is of interest to note that, even in the case of international procedures which require the prior exhaustion of local remedies, a distinction has been made between cases concerning individuals and those relating to legislation or administrative practice. The most developed case law is to be found in the framework of the European Convention on Human Rights. That Convention lays down a requirement of exhaustion of domestic remedies both for inter-state complaints and for petitions by individuals (Article 26). However, at least in inter-state cases, it is the settled case law of the European Commission of Human Rights that that condition does not apply where an application raises, as a general issue, the compatibility with the Convention of legislative measures and administrative practices. (Endnote 184) Such cases are to be distinguished from those in which violations of the Convention are alleged in respect of particular individuals or groups of individuals, where the local remedies rule applies even in inter-state cases. It has been observed that the decisive test here is not the inter-state character of the dispute, but the nature of the allegations. (Endnote 185)

467. In comparing the approach adopted under the European Convention and in ILO procedures, it should be borne in mind

that, by virtue of its tripartite structure, the ILO accords not only to governments, but also to employers' and workers' organisations and to their delegates to the Conference, the right to activate the investigation of issues not involving their own interests. Whereas, under the European Convention, a rule of receivability expressly laid down is considered not to be applicable to allegations involving legislation or administrative practice, in the ILO a rule which is not specifically provided for has exceptionally been taken into account by the Freedom of Association Committee in weighing up evidence concerning allegations involving isolated incidents or individuals as distinct from more general situations. All matters so far referred to Commissions of Inquiry under article 26 of the ILO Constitution have related to general issues of compatibility of legislation and practice with the Conventions concerned. That also is the situation in the present case.

468. The Commission accordingly decided to take into consideration the information on individual cases, as evidence of the effect of the relevant legislative texts and of administrative practice.

Law and practice in the Federal Republic of Germany with respect to the matters at issue

469. The Commission will now proceed to set out its findings on the situation in the Federal Republic with respect to the matters at issue. In general, there has been no dispute as to the elements of that situation, nor as to the facts of individual cases. Any divergencies of view presented to the Commission have related rather to the evaluation of the situation in terms of the requirements of the Discrimination (Employment and Occupation) Convention.

470. The present case arises out of measures affecting employment in the public service of persons engaged in or associated with political activities, parties or organisations considered to have aims hostile to the free democratic basic order. Those measures have, in the main, taken the form of refusal of admission to the public service or action to dismiss persons already in such employment. They have concerned, in particular, members and supporters of the German Communist Party (DKP) and of other parties or organisations with Marxist-Leninist orientations. They have also been applied to persons pursuing extreme right-wing causes, particularly within the National Democratic Party (NPD). Some cases have also concerned persons active in certain other organisations, such as socialist student associations or organisations with pacifist objectives.

471. The measures in question have been determined by a combination of factors: constitutional and legislative provisions (and, as regards persons employed in the public service under labour contracts, corresponding provisions in collective agreements), the case law of the courts, and the policies and practices adopted by the public authorities in applying the relevant legal provisions. It appears appropriate to recall the principal features of these determinants.

472. By virtue of Article 33(2) of the Basic Law of the Federal Republic of Germany (the Federal Constitution), every German shall have equal access to every public post according to his ability, qualifications and occupational performance. Under Article 33(3), no one may suffer disadvantage in connection with access to and rights in the public service on account of adhering or not adhering to a faith or outlook. It is to be noted, in this connection, that public authorities are under an obligation to give reasons for their decisions; persons who consider that they have been treated in a manner inconsistent with their rights may have the matter reviewed by the judicial authorities (by administrative courts in the case of employment under a public law relationship, by the labour courts in the case of employment under a labour law relationship). The existence of these procedural guarantees - which appear to be more extensive in the Federal Republic of Germany than is usual elsewhere - has made it possible for questions of exclusion from the public service to be the subject of judicial examination and to be brought clearly to public attention.

473. Article 33 of the Basic Law contains additional provisions concerning the employment of officials. Article 33(4) requires as a general rule that the exercise of sovereign powers shall be entrusted to persons serving under a public law relationship, i.e. officials (Beamte). According to Article 33(5), the law of the public service is to be regulated with due regard to the traditional principles of service as officials. The courts have identified the duty of faithfulness to the free democratic order as constituting one of these traditional principles. The authorities therefore consider that the provisions which define and regulate this duty of faithfulness have constitutional rank, and that action taken to enforce respect for that duty derives from a constitutional obligation.

474. In the case of employment in the federal service, section 7 of the Federal Civil Service Act requires, as a condition for

admission to employment as an official, that applicants should provide a guarantee that they will at all times uphold the free democratic basic order within the meaning of the Basic Law. Under section 52(2) of this Act, officials must by their entire conduct bear witness to their support for the free democratic basic order and act to uphold it. In the case of employment by the Länder, corresponding requirements are laid down by sections 4(2) and 35(1) of the Civil Service (General Principles) Act and in the civil service laws of the Länder adopted in application of that Act.

475. The duty of faithfulness applies to every official. It thus applies equally to officials directly engaged in the administration of the State and to officials in public services such as postal and telecommunications services, the Federal Railways, public health services and public education. Moreover, according to established case law, it applies without distinction according to an official's functions or level of responsibility.

476. The duty of faithfulness to the free democratic basic order has to be respected by an official in his entire conduct. It thus applies to conduct outside the service as well as to conduct within the service. However, in the case of officials holding a lifetime appointment, section 77 of the Civil Service Act and the corresponding provisions applicable at Länder level provide that conduct outside the service constitutes a violation of duty only if, according to the circumstances of the particular case, it is especially liable to impair respect and confidence in a significant manner for the official's post or for the prestige of the civil service.

477. Apart from persons employed in the public service under public law, i.e. as officials, there are also persons employed under a labour law relationship as salaried employees or wage earners (Angestellte or Arbeiter). Under the applicable collective agreements, such persons are subject to a corresponding duty of faithfulness to the free democratic basic order. The labour courts - which are the competent judicial instances to deal with cases arising out of such employment relationships - have considered that, in the case of such employees, the application of the duty of faithfulness has to be differentiated according to the nature of the specific functions involved. In principle, according to the Basic Law, persons employed with the status of officials should be assigned functions involving the exercise of sovereign powers and employment under a labour contract reserved for tasks not involving the exercise of such powers. In practice, no clear distinction is made in the functions assigned to these respective categories of public servants.

478. The above-mentioned provisions of the Basic Law, the legislation relating to the employment of officials and the collective agreements applicable to persons employed in the public service under a labour contract have remained the same throughout the period in which Convention No. 111 has been in force for the Federal Republic of Germany. The manner in which those provisions have been applied has, however, undergone change, partly as a result of developments in the case law of the courts, partly as a result of decisions taken by the competent public authorities. There has, moreover, been interaction between the decisions of judicial and administrative authorities.

479. Article 21(2) of the Basic Law makes provision for political parties to be declared unconstitutional if, judged by their aims or the behaviour of their members, they seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany. Such a declaration must be made by decision of the Federal Constitutional Court. In 1952 and 1956 decisions of this kind were given by that Court, in relation respectively to the Socialist Reich Party and to the Communist Party of Germany (KPD). Since then no further applications have been made to the Constitutional Court under Article 21(2). In 1961, that Court held that, until a party was declared unconstitutional under this special procedure, the party, its officers and members enjoyed protection in respect of their activities.

480. Subsequently, various new parties were established which have been variously described as of an "extremist" or "radical" character, some basing themselves on Marxist analysis and thought, others propounding views considered to hark back to National Socialist ideology. The public authorities have refrained from seeking to have any of these parties declared unconstitutional under Article 21(2) of the Basic Law. They have, however, sought, on the basis of the provisions relating to the duty of faithfulness to the free democratic basic order of persons employed in the public service, to exclude from public employment persons considered to have identified themselves with the aims of such parties. The policies pursued in this matter have found expression in a series of guide-lines for verification of faithfulness to the Constitution. They have also occasioned review by the courts of the legality of the action taken.

481. In its leading decision of 22 May 1975, the Federal Constitutional Court held that the absence of a decision under Article 21(2) of the Basic Law declaring a party to be unconstitutional did not prevent the authorities from considering that the party pursued aims hostile to the Constitution and should therefore be combated politically. It ruled that, in judging the suitability of an applicant for admission to the public service, account might be taken of the fact that he had joined or belonged to such a party, irrespective of whether it had been declared unconstitutional by the Federal Constitutional Court. (Endnote 186)

482. That decision of the Federal Constitutional Court gave judicial recognition to the concept of hostility to the Constitution, on which the various measures of exclusion from the public service previously mentioned (both refusals of admission to the public service and dismissals) have been based. In particular, by reference to its programme, the courts have considered the aims of the German Communist Party (DKP) to be hostile to the Constitution. Of special importance, in this connection, have been the judgments of the Federal Administrative Court in the Peter and Meister cases (of October 1981 and May 1984 respectively). The courts have also considered the National Democratic Party of Germany (NPD) to pursue aims hostile to the Constitution. According to the judgment of the Federal Administrative Court in the Eigenfeld case (March 1986), that conclusion was based on the publications and statements by the party and its members, rather than on the party programme.

483. The concept of hostility to the Constitution has been the subject of criticism, both within the Federal Republic of Germany and in documents and evidence submitted to the Commission. The principal point of that criticism has been that the concept finds no mention in the Constitution and laws of the Federal Republic; on the contrary, the former envisages only two situations for political parties - one of lawfulness, the other of unconstitutionality. It has been observed that the 1975 decision of the Federal Constitutional Court has given a general discretion to administrative authorities and courts to deprive political parties and their members of the protection which the Constitution sought to grant them, in disregard of the procedural safeguards laid down in it. (Endnote 187) While the Commission has noted these comments, it must point out that it is not part of its mandate to consider the consistency with the Basic Law of particular aspects of the case law established by the courts of the Federal Republic of Germany. The Commission must take established case law as part of the facts before it. Its function is to examine whether the legal situation and practice resulting from relevant judicial decisions are consistent with Convention No. 111.

484. It is however appropriate to note that, even though parties such as the DKP and the NPD have been considered to have aims hostile to the Constitution, their activities are lawful, and they participate in the political life of the country on the same footing as other parties. In the cases brought to the attention of the Commission, with one exception, (Endnote 188) it was not alleged that the individuals concerned had, in the course of their political activities, acted illegally or contrary to the Basic Law.

485. In its decision of May 1975, the Federal Constitutional Court enunciated a series of principles with reference to the duty of faithfulness to the free democratic basic order in the public service. (Endnote 189) Although the case before the Court concerned the constitutionality of legislative provisions relating to the conditions of admission to the preparatory service of lawyers, these principles refer to standards of conduct generally of applicants and of those employed in the public service, whatever their status. The Court observed, *inter alia*, that the duty of faithfulness applied to all officials, and could not be differentiated according to the nature of their functions. The duty required more than a merely formally correct but otherwise uninterested, cool and internally distant attitude towards the State and the Constitution; it required in particular that officials should distance themselves unequivocally from groups and endeavours which attacked, combated and defamed the State and the Constitution.

486. The last mentioned requirement has played an important role in decisions of the public authorities and courts regarding exclusion from the public service of applicants for employment and dismissal from the public service. Participation in or association with parties or organisations considered to have aims hostile to the Constitution has been held to be incompatible with the duty of faithfulness. In such circumstances, statements made by those concerned that they supported and would not act against the free democratic basic order, and evidence as to the propriety of their conduct in the political activities actually undertaken, have not been considered relevant.

487. In January 1972 the Federal Chancellor and the heads of the governments of the Länder sought to harmonise practice in the application of the provisions relating to the duty of faithfulness of public servants. They approved a common declaration,

the so-called "Radikalenerlass". That declaration had no direct normative effect, but led to the adoption, both at the federal level and by the Länder, of decisions to regulate the manner of verifying observance of the duty of faithfulness. At the federal level, the rules were revised in May 1976 and again in January 1979.

488. It was the situation following the adoption of the revised federal principles of 1979 that was considered by the ILO Governing Body when it was seised of the first representation on the matter made by the WFTU. (Endnote 190) In the report adopted by the Governing Body in November 1979, it was observed that the new provisions applicable to federal employment were likely to limit the discretionary powers previously left to employing authorities by establishing that there should be a presumption of faithfulness and a case-by-case assessment of situations and by abandoning the practice of systematic inquiries. The report noted, however, that the revised principles had entered into force only recently and that their effect would depend on their future practical application. It would also be necessary to examine the evolution of the situation at the level of the Länder, which had been able, within the framework of their administrative autonomy, to apply more stringent principles and where, according to available information, cases involving inquiries and the rejection of applicants had been proportionally more numerous than in the federal administration. It was on that basis that the Governing Body decided to declare the closure of the procedure in respect of the earlier representation.

489. It has become apparent in the present inquiry that the policies and practices followed by various authorities in the Federal Republic as regards verification and enforcement of compliance with the duty of faithfulness to the basic order have diverged considerably over recent years. That has been the result partly of the adoption of different guide-lines on the matter, partly also of different responses to judicial decisions.

490. Only some of the Länder governments modified their rules for verification of faithfulness to the Constitution following the changes adopted in 1979 for federal employment. More recently, in June 1985, the Saarland Government formally abrogated those rules, while maintaining in force the relevant provisions of its legislation relating to employment in the public service. Witnesses who appeared before the Commission observed that at the present time exclusions from the public service under the provisions relating to the duty of faithfulness were concentrated in certain Länder (Baden Württemberg, Bavaria, Lower Saxony, Rhineland-Palatinate and Schleswig-Holstein) and in the federal administration. (Endnote 191)

491. According to information provided to the Commission during its visit to the Federal Republic by the representatives of the Saarland Government, the authorities of that Land, in applying the relevant legislative provisions, base themselves on the presumption that a citizen is faithful to the Constitution, and there would be an investigation on the matter only if a person were engaged in active endeavours against the Constitution. The individual's own acts are the decisive consideration. Membership in any lawful political party and lawful activities in such a party (including the holding of party office and standing as a candidate for the party at elections) would not be considered incompatible with the duty of faithfulness to the Constitution, since it is felt that the exercise of political rights should not lead to disadvantage in employment or occupation. The Saarland authorities also consider that it would be appropriate, in applying the provisions relating to the duty of faithfulness to the Constitution, to differentiate according to the nature of the job and the area in which functions are exercised.

492. The position in Hessen appears to be substantially similar to that in Saarland. The agreement made in 1984 between the parties constituting the present Land Government provides that membership of a party and the exercise of membership rights, particularly by means of candidatures, should not be held against any official, salaried employee or wage earner in verifying qualifications for admission to the public service. The representatives of the authorities informed the Commission that the decisive change in practice had occurred upon the adoption in 1979 of revised rules for verifying faithfulness to the Constitution, and that the 1984 coalition agreement had merely confirmed that practice. The 1979 rules abolished systematic inquiries about applicants and placed emphasis on the individual circumstances of each case. They also provide, inter alia, that the State starts from a presumption of faithfulness of its citizens to the Constitution, that applicants for employment in the public service confirm their duty of faithfulness to the Constitution by the oath to respect the Basic Law of the Federal Republic as well as the Constitution and laws of Hessen, and that the principle of proportionality applies in deciding whether, in a particular case, an inquiry should be addressed to the authorities responsible for the protection of the Constitution. The present practice of the Land Government was reinforced by a resolution adopted by the Land Parliament in January 1985, affirming that the exercise of civic rights, such as standing as a candidate in local, Land or federal elections and the acceptance of corresponding mandates, should not lead to any disadvantages in public service. The authorities informed the Commission

that, in considering the circumstances of each case, the nature of the functions held or to be exercised was one of the factors taken into account. They also indicated that the present Government had undertaken a review of earlier cases in which admission to the public service, or appointments as officials, had been refused, and that this had resulted in positive solutions in a number of cases.

493. In North Rhine-Westphalia the revised rules for verification of faithfulness to the Constitution of applicants for employment in the public service, adopted in January 1980, are similar to the provisions of Hessen referred to above. As a result of the abolition of systematic inquiry to the Office for the Protection of the Constitution in respect of applicants, the number of inquiries fell from some 50,000 a year to as few as three a year in the period 1983 to 1985, and the authorities stated that since 1980 there had hardly been cases in which admission to public employment had been refused on the ground of failure to guarantee faithfulness to the Constitution. The authorities also undertook a review of cases in which employment had previously been refused on this ground, and they indicated that, except in certain instances where those concerned had not applied or where the matter was still under consideration, these so-called "old cases" had been settled. Following the judgment of the Federal Administrative Court in the Peter case in 1981, the Land Government in March 1983 adopted supplementary rules, which in particular establish that, with the exception of local authority elections, the fact of standing as a candidate for a party with aims hostile to the Constitution is to be considered an activity relevant for disciplinary purposes. While the existing rules do not refer to the effect of holding office in such a party or organisation, the authorities indicated that only higher offices would be considered relevant for disciplinary purposes.

494. None of the documented cases before the Commission concerns employment in Hamburg or Bremen. Although the Commission did not hear evidence from representatives of the authorities of these Länder nor had discussions with those authorities during its visit to the Federal Republic, it appears from evidence given by witnesses presented by the WFTU that the application of the provisions relating to the duty of faithfulness in these two Länder does not currently give rise to any difficulty or criticism. According to documentation from a Hamburg committee against "Berufsverbote", the practice so designated had completely ceased there and in October 1985 the remaining three cases of earlier exclusion from the public service had been resolved by the admission to employment of the persons concerned. In Bremen the provisions relating to verification of faithfulness to the Constitution of public servants were amended in 1983 to provide that, in judging whether conduct by a public servant outside the service would justify disciplinary proceedings or dismissal, account should be taken of the nature and extent of that conduct and of the tasks assigned to the public servant; a violation of duty would be significant if the conduct in question could not be accepted even with due regard to the public servant's fundamental rights, in particular freedom of expression. These provisions correspond to a bill presented to the Federal Diet in 1982 by the Federal Government, with a view to amending the legislation governing civil service employment at both federal and Länder levels, but which, following the change of government shortly thereafter, was not proceeded with.

495. In contrast to the liberalisation of approach adopted in the above-mentioned Länder, others have maintained the essential features of their original rules in the matter. This is the case in Baden-Württemberg, Bavaria, Lower Saxony, Rhineland-Palatinate and Schleswig-Holstein. The practice of these Länder involves significant differences not only in the procedure followed to verify faithfulness to the free democratic basic order of applicants for public employment, but also in the criteria for judging compliance with that requirement in the case both of applicants and of persons already employed in the public service. These Länder have maintained the principle of systematic inquiries from the Office for the Protection of the Constitution in respect of applicants (subject, in Lower Saxony, to certain exceptions). In the absence of any presumption of faithfulness to the Constitution, the burden of establishing that they would at all times uphold the free democratic basic order rests upon applicants. These Länder interpret strictly the obligation for applicants (as well as for persons in the public service) to distance themselves from parties or organisations considered to have aims hostile to the Constitution. (Endnote 192) As a result, political attitudes and activities which in the previously mentioned group of Länder would not constitute a bar to admission to the public service have led to the rejection of applicants in the latter group of Länder. (Endnote 193) The courts have held that, just as in judging other qualifications, public authorities enjoy a margin of appreciation in reaching decisions as to whether an applicant provides the requisite guarantee of faithfulness to the Constitution; the courts may check whether such decisions have been based on errors of fact, disregard the legislative and constitutional framework within which decisions may freely be taken, or are arbitrary, but they may not substitute their own evaluation of the facts for that of the authorities concerned. (Endnote 194)

496. There exists a corresponding divergence in the approach adopted by the various Länder in judging the compatibility with the duty of faithfulness of political attitudes and activities of persons already employed in the public service. The Länder involved in the documented cases of this kind before the Commission (leaving aside one case dating back to 1975) are Baden-Württemberg, Lower Saxony, Rhineland-Palatinate and Schleswig-Holstein. The grounds on which it has been sought to remove the persons concerned from the public service have been analysed in an earlier chapter. (Endnote 195) They include suspected membership of the DKP, combined with refusal to answer questions concerning such membership or to distance oneself from that party; (Endnote 196) limited participation in party activities; (Endnote 197) holding office in the party; (Endnote 198) standing as a candidate for the party at elections; (Endnote 199) and being a DKP member of a municipal council. (Endnote 200) Such activities would generally not be considered as involving a breach of duty in Länder such as Bremen, Hamburg, Hessen and Saarland nor (except in limited circumstances) in North Rhine-Westphalia.

497. From the documented cases relating to disciplinary measures against officials in federal employment and evidence given before the Commission by government witnesses, it appears that the federal authorities also adopt a strict approach in considering the disciplinary implications of involvement in a party held to have aims hostile to the Constitution. The Federal Disciplinary Prosecutor, referring to the case law of the highest judicial instances in disciplinary matters, stated that active work on behalf of such a party went far beyond the minimum of weight and evidence required to establish a violation of duty; an official who supported a party with aims hostile to the Constitution and was not prepared to distance himself from it could not remain an official. (Endnote 201) In the documented cases before the Commission, disciplinary proceedings against officials in federal employment have been based principally upon the holding of office in a party held to have aims hostile to the Constitution and standing as a candidate at elections, whether at federal, Land or local level; membership of a municipal council on behalf of the party has also been a ground for disciplinary proceedings. (Endnote 202) In a number of instances, the officials concerned have been working in places where, had they been in the service of the Land, their activities would normally not have disciplinary consequences. (Endnote 203)

498. The Commission has noted that in several recent decisions the Federal Disciplinary Court has taken the view that activities on behalf of a lawful political party (including membership, holding party office and standing as a candidate at elections) do not constitute a violation of the duty of faithfulness to the free democratic order. These decisions diverge from the established case law of the Federal Administrative Court, as also from the position adopted by various courts at Land level. (Endnote 204) The federal authorities have appealed against them to the Federal Administrative Court, and have also maintained the suspensions of the officials concerned on the ground that their activities were expected ultimately to result in their dismissal.

499. Various comments were submitted to the Commission regarding the numerical significance of cases of refusal of admission to or exclusion from the public service in application of the duty of faithfulness to the free democratic basic order. The Government of the Federal Republic provided statistics on this question, and emphasised the relatively small number of cases involved. The Government observed, however, that the compatibility of its law and practice with Convention No. 111 had to be judged as such, irrespective of the number of persons affected. The Commission would agree with that remark. The information which it has received on the facts of individual cases is of interest primarily as evidence of the effect of the legislative and other provisions relating to the duty of faithfulness and of the policies and practices followed by the various authorities in applying those provisions. Beyond the cases of persons directly affected, those policies and practices also have certain broader effects. The Federal Government has indicated that there are approximately 2,500 persons employed in the public service who are known to be members of organisations regarded as extremist, and that the actual number of such persons is believed to be substantially higher. For all such persons the question exists how far they may give expression to their political beliefs through participation in public life and constitutional processes. The same question arises for all those who, even before they seek employment in the public service, will have to consider the possible effects of manifesting their political opinions on prospects of obtaining such employment in times to come.

500. The Government of the Federal Republic has presented to the Commission a series of arguments with a view to demonstrating that there exists no incompatibility between law and practice in the Federal Republic and the requirements of the Discrimination (Employment and Occupation) Convention. The Commission will now proceed to examine these submissions. It will consider first questions concerning the applicability of Convention No. 111 to employment relations of officials, the area of protection of the Convention, the bearing of the definition of "discrimination" in Article 1, paragraph 1 of the Convention,

certain considerations advanced by the Government regarding the nature of the obligations assumed by States which have ratified Convention No. 111, and the significance of certain recent judgements by the European Court of Human Rights. It will then examine the information at its disposal in the light of two crucial provisions of the Convention, namely, Article 1, paragraph 2 (relating to inherent job requirements) and Article 4 (regarding measures related to activities prejudicial to the security of the State).

Applicability of Convention No. 111 to employment relations of officials

501. In the comments submitted to the Commission in March 1986, the Government of the Federal Republic raised the question whether Convention No. 111 applies to the relationship of officials (Beamte) characterised by special rights and duties under public law. (Endnote 205)

502. The Commission recognises that the provisions of Convention No. 111 in no way limit the freedom of a State to determine whether persons in public service are to be governed by the same legal provisions as persons employed in the private sector and whether and to what extent to assign to them particular functions such as those described in the Federal Republic of Germany as involving the exercise of sovereign authority. Nor has the Convention any bearing on the decisions taken in each State as to what fields of employment are placed under the control of public authorities and in the private sector respectively.

503. On the other hand, there is nothing in Convention No. 111 which either expressly or implicitly would permit the exclusion of persons because they are employed by public authorities or on the basis of the particular legal status which they are given in their employment. The Convention requires the promotion of equality of opportunity and treatment in respect of employment and occupation. The preparatory work leading to the adoption of the Convention emphasised the comprehensive meaning which the International Labour Conference intended to give to the concept of "employment and occupation". (Endnote 206) The Committee of Experts on the Application of Conventions and Recommendations, by reference to these preparatory discussions, has observed that "no provision of the Convention limits its scope as regards either individuals or occupations. It embraces all sectors of activity, it covers both public service and private employment and occupations ...". (Endnote 207)

504. It is to be noted that Article 3(d) of Convention No. 111 requires ratifying States to pursue the national policy of equality of opportunity and treatment "in respect of employment under the direct control of a national authority". It is also relevant to refer to the Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111), which supplements the Convention by indicating in greater detail the manner in which the policy provided for in the Convention may be implemented. Paragraph 2(c) of the Recommendation states that "government agencies should apply non-discriminatory employment policies in all their activities". Paragraph 3(a) states that each State should ensure the application of the principles of non-discrimination in respect of employment under the direct control of a national authority. Paragraph 3(b) deals with action by non-central authorities; it recommends that state, provincial or local government departments or agencies and industries and undertakings operated under public ownership or control be encouraged to ensure the application of the principles of non-discrimination. All these provisions confirm the intention of the International Labour Conference to extend the application of the Convention to public employment.

505. While, as already indicated, Convention No. 111 leaves States free to determine the nature of the legal relationships under which persons in the public service are employed, there is no reason why the choice of a particular form of relationship by a national legal system should take the persons subject thereto out of the protection provided for in the Convention. A similar question was considered by the International Labour Office already in 1931, in reply to an inquiry from the German Government regarding the scope of certain provisions of the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30). The Government considered that, owing to their special status, officials could not be deemed either manual or non-manual workers and that they thus fell outside the scope of international labour Conventions. In his reply of 14 October 1931, the Director of the ILO, Albert Thomas, observed that, where a Convention applied to persons employed in public undertakings or establishments, no distinction was made according to the legal nature of the rules governing their conditions of service. "The Convention therefore applies to these persons even if, according to the public law of certain States, they have the status of officials." (Endnote 208)

The area of protection of Convention No. 111

506. The Government of the Federal Republic has argued that the measures taken to maintain a public service faithful to the Constitution do not fall within the area of protection laid down in Convention No. 111. It has stressed that these measures are designed to protect the basic features of the free democratic basic order, and considers that an ILO Convention aimed at guaranteeing human rights should not be interpreted so as to protect persons who advocate a totalitarian system. In favour of this view it has referred to Article 5, paragraph 1, of the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966. (Endnote 209) That provision reads as follows:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.

507. In the first place, it appears appropriate to note that the structure and approach adopted respectively in the International Covenants on Human Rights and in ILO Convention No. 111 are significantly different. The Covenants cover a broad range of human rights, and they define those rights, as well as any permitted limitations thereon, in general terms. Thus, the Covenant on Civil and Political Rights, in Article 25, recognises the right and opportunity of every citizen, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions, to have access, on general terms of equality, to public service in his country. It does not define more precisely the nature of the restrictions which may be imposed. The Covenant on Economic, Social and Cultural Rights (which, in Article 5, paragraph 1, contains a provision identical to that cited by the Government) recognises the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts (Article 6) and, by virtue of Article 2, paragraph 2, requires that right to be guaranteed without discrimination of any kind as to specified factors. That Covenant contains no provision concerning measures to promote equality of opportunity and treatment in employment, nor does it define circumstances in which distinctions or exclusions may be justified. Each of the Covenants, in Part II, contains certain general limitation clauses, including that set out in Article 5, paragraph 1. ILO Convention No. 111 is confined to the specific question of equality of opportunity and treatment in employment and occupation. It sets out in some detail the action to be taken by governments with a view to eliminating discrimination in that field. It defines what is to be considered as discrimination for the purpose of the Convention, and expressly identifies certain circumstances which shall not be so considered. It would appear difficult to read into the Convention, in addition to the express exception clauses, an implied exception drawn from other, very differently conceived instruments. It is, moreover, to be noted that difficulties have been encountered in determining the precise scope and effect of the provision in the Covenants to which the Government has referred. (Endnote 210)

508. It also appears necessary to bear in mind the distinction between sanctions that it may be legitimate to impose for conduct aimed at the destruction of rights and freedoms, on the one hand, and qualifications for employment, on the other. Conduct of the kind mentioned may lead to conviction and punishment under penal law. Even where a person has been found guilty of such an offence, the implications of his conduct in the field of employment remain to be examined. Here the relevant consideration is not retribution or punishment, but whether the conduct concerned renders the person unfit for the work in question. Where the conduct referred to is lawful, the criterion of fitness for employment can be the only relevant one. That, indeed, appears to be the view also of the Government of the Federal Republic. In the comments submitted in June 1986, it observed: "The crucial question is: who is suitable for a post as an official in the public service of the Federal Republic of Germany?" That is likewise the issue to which the provisions of Article 1, paragraph 2, and Article 4 of Convention No. 111 are addressed. Those provisions accordingly provide the proper framework within which the matter may be determined.

509. Lastly, it would be difficult to consider that persons who have behaved lawfully and are in full enjoyment of their civic rights (Endnote 211) might be placed wholly outside the protection of Convention No. 111. That matter is considered in greater detail in paragraph 519 below.

The bearing of the definition of "discrimination" in Article 1, paragraph 1, of the Convention

510. In its comments of March 1986, the Federal Government has presented a series of arguments in favour of the view that there exists in the Federal Republic no discrimination within the meaning of Article 1, paragraph 1, of Convention No. 111.

(Endnote 212)

511. In the first place, the Government has observed that Article 3, paragraph 3, of the Basic Law, like Convention No. 111, prohibits any prejudice or preference on account of a person's political attitude. According to the Federal Constitutional Court, this constitutional provision is not violated by the protective measures to maintain a public service faithful to the Constitution. The requirement imposed on applicants for employment in the public service and on officials is that they recognise the central basic values of the constitutional order which secure freedom. The Government considers that measures to maintain a public service faithful to the Constitution are not connected with the political views of the person concerned.

512. These comments raise several questions. In the first instance, it appears appropriate to point out that conclusions reached by national courts as to the compatibility of certain laws or practices with guarantees of freedom of expression embodied in their country's constitution cannot bind international bodies which are called upon to consider the compatibility of those laws and practices with the requirements of an international Convention.

513. It is to be noted that Article 1, paragraph 1, of Convention No. 111 contains a purely descriptive definition of what constitutes "discrimination" for the purpose of that Convention, namely, "any distinction, exclusion or preference made on the basis of ... political opinion ... which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation". There can be no doubt that the measures taken in the Federal Republic of Germany in application of the provisions governing the duty of faithfulness to the free democratic basic order of persons in the public service have the effect of excluding those affected from such employment and of nullifying or impairing their opportunity of access to or continuance in employment. They therefore come within the ambit of the definition contained in Article 1, paragraph 1, of Convention No. 111, and that definition is not displaced by the fact that the measures in question establish qualifications for certain kinds of employment or because their purpose is to maintain certain standards of conduct in the public service. Such questions of justification require consideration not in relation to the definition in Article 1, paragraph 1, but under the terms of the relevant exception clauses of the Convention.

514. The Government's comments raise the further question whether the measures under consideration are taken on the basis of political opinion, within the meaning of Convention No. 111.

515. In this connection, the Commission recalls the views expressed by the Committee of Experts on the Application of Conventions and Recommendations that "in protecting workers against discrimination on the basis of political opinion, the Convention implies that this protection shall be afforded to them also in respect of activities expressing or demonstrating opposition to the established political principles ..." (Endnote 213) The protection of freedom of expression is aimed not merely at the individual's intellectual satisfaction at being able to speak his mind, but rather - and especially as regards the expression of political opinions - at giving him an opportunity to seek to influence decisions in the political, economic and social life of his society. For his political views to have an impact, the individual generally acts in conjunction with others. Political organisations and parties constitute a framework within which the members seek to secure the wider acceptance of their opinions. To be meaningful, the protection of political opinions must therefore extend to their collective advocacy within such entities. Measures taken against a person by reference to the aims of an organisation or party to which he belongs imply that he must not associate himself with those aims, and accordingly restrict his freedom to manifest his opinions.

516. The Commission observes that the provisions relating to the duty of faithfulness in force in the Federal Republic of Germany require public servants by their entire conduct to express their support for the free democratic basic order. What is called for is thus conduct demonstrating a particular attitude. One finds this fact reflected in a series of pronouncements. Thus, the Federal Constitutional Court, in its decision of 22 May 1975, observed: "It is expected of an official that he should recognise and accept this State and its Constitution as of great positive value, which it is worth while to defend". The spokesman for the Federal Government, when replying to the debate in the Federal Diet in January 1986, restated the Government's position as being to ensure "that only those may find employment in the service of the State who out of inner conviction support the basic values of our free democratic Constitution". In the legal opinion by Professor Doehring submitted to the Commission by the Federal Government, it was observed that the rejection of an applicant for public employment would be justified if, in knowledge of the principles advocated by the DKP, he stated that he would stick to these political ties. Although the courts, in judging whether an individual complied with the duty of faithfulness, have distinguished between different degrees of

involvement in the activities of a party or organisation held to have aims hostile to the Constitution, they have done so in order to determine whether that involvement showed a sufficient identification with the aims of the party or organisation to conclude that the individual himself was seeking to pursue aims hostile to the Constitution. In the Meister case, the Federal Administrative Court observed that an official violates the duty of faithfulness if, by acceptance of party offices and candidatures in general elections, he proclaims himself as a spokesman for the DKP and publicly advocates its policies. Similarly, in the Eckartsberg case, the Lower Saxony Disciplinary Court observed that he had violated the duty of faithfulness because, by publicly appearing as a candidate for the DKP, he had identified himself with the key statements of the party programme. The Chief of the Department for Personnel Matters of the Federal Ministry of Posts and Telecommunications, in evidence before the Commission, emphasised that the gravamen of the charge against postal officials against whom disciplinary proceedings for breach of the duty of faithfulness had been taken was their deficient attitude towards the Constitution.

517. In the light of the foregoing indications, it does not appear possible to accept the contention that the measures in question are not connected with the political views of the persons concerned.

518. A further argument advanced by the Government is based on the fact that, under Article 79, paragraph 3, of the Basic Law, certain of its provisions establishing the basic principles of a free democratic order are not open to amendment. The Government has referred, in this connection, to comments by the Committee of Experts on the Application of Conventions and Recommendations that the propagation of doctrines aimed at bringing about fundamental changes in the institutions of the State are not beyond the protection of Convention No. 111 "in the absence of the use or advocacy of violent or unconstitutional methods to bring about that result". (Endnote 214) The Government observes that, in so far as the programme of the DKP is aimed at the change or elimination of fundamental features of the Basic Law which are not open to amendment, the realisation of those aims could be achieved only by means not permitted by the Constitution; accordingly, persons who participate actively in furthering the party's aims and programmes, by holding office in or standing as a candidate in elections on behalf of the party, are not protected by Convention No. 111. In the Government's view, the fact that the DKP has not been declared unconstitutional pursuant to Article 21, paragraph 2, of the Basic Law does not change this situation. The Government distinguishes the situation of officials, who are required by Article 33, paragraph 5, of the Basic Law to uphold the constitutional order, from that of citizens, who are free to reject and politically combat that order if they do so in a party which is not prohibited, and by generally permitted means.

519. The above arguments raise a number of questions. Among them is the issue whether the programme of the DKP, and of other parties or organisations considered to have aims hostile to the Constitution, would involve changes in any of the intangible provisions of the Basic Law and, if so, whether this would lead the party or organisation into action of an unconstitutional nature or, on the contrary, would impose legal limits on the action which might be taken. The Commission finds it unnecessary to enter into these issues in the present context - namely, consideration of the scope of the definition of discrimination in Article 1, paragraph 1, of the Convention. The decisive question to be considered here is whether one can exclude from the aforesaid definition, and therefore wholly from the scope of Convention No. 111, the advocacy and pursuit of political aims in a form which everyone admits to be lawful. The effect of such an exclusion would be to remove the persons concerned altogether from the protection of the Convention: they could thus be the subject of exclusion or unequal treatment not only in public employment, but in all sectors and in relation to all aspects of employment and occupation covered by the Convention. They could be denied any form of training and any employment, even of the most menial nature, and be submitted at will to unequal treatment in whatever work they had. The distinction made by the Government between the freedom of political action enjoyed by the citizen and the more circumscribed position of public officials has meaning only if it is related to the nature of the functions exercised by the latter. That, however, is an issue which calls for consideration in regard to Article 1, paragraph 2 (distinctions based on the inherent requirements of particular jobs); it does not appear to justify distinctions within the definition set out in Article 1, paragraph 1.

520. A further issue raised in the documentation submitted by the Federal Government is how far the concept of discrimination in international law requires the existence of differences of treatment which are arbitrary in nature. (Endnote 215) It has to be noted that the express definition contained in Convention No. 111 does not embody a reference to the element of arbitrariness, but refers to "any distinction, exclusion or preference" made on specified grounds which has the effect of nullifying or impairing equality of opportunity or treatment. The question of justification for particular distinctions, exclusions or preferences is addressed by the exception clauses to which reference has already been made. It is within the framework of

those provisions, rather than under a general criterion which would have to be read into the instrument and which would leave a wide measure of discretion to each ratifying State, that the possible justification for the measures adopted in the Federal Republic of Germany needs to be examined. The Commission observes, moreover, that a reference to the element of arbitrariness is not contained in the definition of "discrimination" in other international instruments. (Endnote 216)

The nature of obligations assumed under Convention No. 111

521. In documentation presented by the Federal Government as part of its comments in March 1986, it was pointed out that, according to Articles 2 and 3 of Convention No. 111, the Convention was to be implemented "by methods appropriate to national conditions and practice". It was observed that consequently the special legal and political conditions of the Federal Republic must be taken into account in judging the issues before the Commission. (Endnote 217)

522. It appears necessary, in this connection, to distinguish between the protection called for by the Convention and the means to be employed to achieve that protection. Article 2 requires the declaration and pursuit of a policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof. Article 3 calls for more specific measures, including the pursuit of the aforesaid policy in respect of employment under the direct control of a national authority and the modification of any administrative instructions or practices which are inconsistent with the policy. In stating that these various measures are to be promoted or taken "by methods appropriate to national conditions and practice", the Convention does not modify the objective or standard to be attained, but merely allows a certain flexibility as regards the means chosen to work towards its attainment. For example, if an administrative instruction or practice involves discrimination as defined in the Convention, the State concerned must modify it in order to bring it into conformity with the non-discrimination policy called for by the Convention, and cannot escape that obligation by claiming that the practice is appropriate to national conditions. In its general survey of 1963 the Committee of Experts on the Application of Conventions and Recommendations observed that the reference to "methods appropriate to national conditions and practice" allowed each country "the necessary degree of latitude in deciding the technical methods to use and combining the various forms of action, in the light of the particular problems confronting each country." (Endnote 218) The Committee of Experts also referred to the freedom left to each country to choose methods which seemed most appropriate "from the point of view of their nature, timing and intensity". (Endnote 219)

523. The Commission accordingly considers that the arguments advanced by the Government regarding the particular circumstances existing in the Federal Republic need to be examined not as mere questions of the methods chosen to promote equality in respect of employment and occupation, but as a factor to be taken into account in determining the substantive question whether the measures taken in regard to access to and employment in the public service fall within the exceptions provided for in Article 1, paragraph 2, and Article 4 of the Convention. That is the framework within which the Commission has examined the matter.

The significance of recent judgements of the European Court of Human Rights

524. In the further comments presented by the Government of the Federal Republic of Germany in November 1986, it referred to the judgements rendered by the European Court of Human Rights on 28 August 1986 in the cases concerning Julia Glasenapp and Rolf Kosiek. (Endnote 220) The Commission has examined the significance of these judgements for the issues before it.

525. The European Court of Human Rights held, on the basis of the relevant preparatory work, that the right of access to the civil service was not secured by the European Convention on Human Rights or any of its Protocols. It noted that the duty to uphold the free democratic system within the meaning of the Basic Law was one of the personal qualifications required of anyone seeking a post as a civil servant in the Federal Republic, and observed: "This requirement applies to recruitment to the civil service, a matter that was deliberately omitted from the Convention, and it cannot in itself be considered incompatible with the Convention." Considering that access to the civil service lay at the heart of the issue before it, and that the authorities had taken account of the opinions and attitude or activities of the individuals concerned merely in order to determine whether they had the required personal qualifications for the posts in question, the Court concluded that there had been no interference with the right to freedom of expression protected under Article 10, paragraph 1, of the Convention.

526. In effect, the judgements held the cases in question to fall outside the scope of the European Convention on Human Rights and its Protocols *ratione materiae*. The Court did not examine whether the restrictions in question were justified in determining fitness for employment. These judgements accordingly have no bearing on the case before the present Commission. There can be no doubt that questions concerning access to and treatment in the public service fall within the scope of ILO Convention No. 111, and that it is therefore necessary for the Commission to examine whether the limitations resulting from application of the provisions on the duty of faithfulness to the free democratic basic order are justified under the provisions of that Convention.

Inherent job requirements - applicability of Article 1, paragraph 2, of Convention No. 111 to the measures under consideration in the present inquiry

527. While the Government of the Federal Republic has advanced a broad range of arguments in justification of the measures adopted to exclude certain types of persons from the public service, in the comments submitted in June 1986 it observed that the crucial question was: who is suited for a post as an official in the public service of the Federal Republic? The Commission agrees that that is indeed the essential issue. It is thus necessary to determine whether, and how far, the measures adopted in the Federal Republic regarding access to and employment in the public service fall within Article 1, paragraph 2. According to that paragraph, "any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed discrimination".

528. The Government of the Federal Republic considers that the activity of an official constitutes a "particular job" ("eine bestimmte Beschäftigung") within the meaning of the above-mentioned provision, so that all restrictions which necessarily follow therefrom for all persons employed with the status of official would be covered by that exception. It has emphasised that the duty of faithfulness is an essential condition of service as an official, aimed at ensuring the proper functioning of the institutions of the State at all times, and that that duty therefore applies to all officials without distinction as to their functions. (Endnote 221)

529. In the light of these arguments, it appears appropriate in the first instance to consider the scope and effect of Article 1, paragraph 2, and then to examine how the actual situation in the Federal Republic relates to that provision.

530. It needs to be borne in mind that Article 1, paragraph 2, is an exception clause. It should therefore be interpreted strictly, so as not to result in undue limitation of the protection which the Convention is intended to provide.

531. Under this clause, distinctions, exclusions or preferences affecting an individual in employment or occupation are to be considered as not constituting discrimination if they are based on the inherent requirements of a particular job. The word "inherent", which is used in the English text, is defined in the Oxford English Dictionary in the following terms: "existing in something as a permanent attribute or quality; forming an element, especially an essential element, of something; intrinsic, essential". A corresponding idea is expressed by the words used in the French text ("qualifications exigées"). (Endnote 222) Accordingly, any limitation which it is sought to bring within the scope of the exception provided for in Article 1, paragraph 2, must be necessary because of the very nature of the job in question. The notion of "necessity" is widely resorted to in international human rights instruments as a criterion restricting exceptions to the rights recognised therein. Moreover, in considering whether a particular limitation can be justified as necessary, it is not sufficient to address only the question whether circumstances exist in which action may be called for to meet a purpose for which limitations are authorised by the provision in question. One must also consider whether the form and extent of the measures actually provided for or taken are commensurate with the exigencies of the situation. In other words, the limitation must be proportionate to the aim pursued. (Endnote 223)

532. It is to be noted that the expression "eine bestimmte Beschäftigung" to be found in the German translation of Article 1, paragraph 2, is capable of referring not merely to "a particular job" but to a broader sector of employment. That however would import into the Convention a meaning which the International Labour Conference specifically rejected. As indicated in Chapter 3 of this report, (Endnote 224) during the first discussion at the Conference in 1957 it was decided to provide for an exception to cover "the inherent requirements of the job"; the Office proposed, as a basis for the second discussion, a text referring to "a particular employment"; subsequently it was observed that a reference to "employment and occupation" would cover a much

wider field than "job"; and during the second discussion it was decided to replace the text suggested by the Office by wording referring to "a particular job". This sequence of events shows an intention to give the exception a limited scope: the reversion to the word "job" and the insertion of "particular" mean that the exception relates to specific posts, work or functions.

533. It is of interest to recall that, during the preparatory work leading to the adoption of the Convention, the Government of the Federal Republic of Germany had itself made comments which suggested that it understood the proposed exception in the above-mentioned sense, since it referred to cases where individual employees were debarred "from certain posts" because of lack of the qualifications required for the job and the exclusion of persons holding divergent political views "from certain positions" in "Tendenzbetriebe" (that is, undertakings directed towards particular political, religious or similar objectives).

534. The above-mentioned interpretation, relating the exception to the inherent requirements of particular posts, work or functions, is also confirmed by comments by the Committee of Experts on the Application of Conventions and Recommendations in which it emphasised that, while political opinions might be taken into account "in the case of certain higher posts which are directly concerned with the implementation of government policy", the same was not true "when conditions of a political nature are laid down for all kinds of public employment in general". (Endnote 225)

535. A further point to note is that the concepts employed in Convention No. 111 must be deemed to have an objective content imposing corresponding obligations on the States which have ratified it. The Committee of Experts on the Application of Conventions and Recommendations has pointed out that ILO Conventions "are international standards, and the manner in which their implementation is evaluated must be uniform and must not be affected by concepts derived from any particular social or economic system". (Endnote 226) The acceptance of the contention that the category "official" in a given country could correspond to the concept of "a particular job" in the Convention would, however, result in permitting entirely different exceptions from one country to another, determined not by the nature of the work or functions involved, but according to whether particular activities lay in the public sector and were entrusted to persons employed with the status of "officials". Great variations exist even in market economy countries in the extent to which given activities lie in the public or private sector, e.g. in transport, telecommunications, generation and supply of energy, education, health services, banking, etc. The situation also undergoes change in time, as particular activities are nationalised or privatised. In countries where the means of production are generally in public ownership, the effect of such an interpretation might be to remove the great bulk of the labour force from the protection of the Convention. To make "inherent job requirements" vary according to all such vagaries would be destructive of any common international standard.

536. Having regard to the foregoing indications, it is necessary to consider whether the measures taken in the Federal Republic with regard to access to and employment in the public service can be justified on the basis of Article 1, paragraph 2, of Convention No. 111 in all the circumstances in which they are applied.

537. It should be borne in mind that the duty of faithfulness to the free democratic basic order is only one of a series of general duties falling upon public servants in the Federal Republic. The Federal Civil Service Act and corresponding legislation applicable to public employment in the Länder, for example, establish also the following duties: the duty to serve the entire nation, not any party; the duty to perform one's functions impartially and justly, with regard to the general welfare; the duty to maintain in any political activities such moderation and reserve as are called for by one's relation to the public and the duties of one's office; the duty to devote oneself fully to one's occupation and by one's conduct to maintain the respect and confidence required by the occupation; the duty to advise and support superiors and to carry out their instructions; the duty to maintain the confidentiality of information received in the exercise of one's functions. Duties of this kind are clearly designed to ensure the effective and impartial functioning of the public service, and are common features of conditions of employment in the public service in other countries too.

538. Questions concerning an individual's attachment to the basic constitutional order also appear to be relevant in considering his suitability to occupy particular positions in the public service. As has already been noted, the Committee of Experts on the Application of Conventions and Recommendations has observed that such considerations might properly be taken into account for certain higher posts directly concerned with the implementation of government policy. They may similarly be relevant for employment in certain areas requiring particularly secure guarantees of loyalty and reliability of their personnel, such as the diplomatic and defence services, as well as for particular positions in other sectors of the public service in

which, on account of the nature of the functions involved, corresponding safeguards appear necessary.

539. Turning to the situation in the Federal Republic of Germany, the Commission proposes to examine the following aspects: the implications of variations of policy and practice among different authorities within the Federal Republic; 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; 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; the undifferentiated application to all officials of the duty of faithfulness; and finally the special situation of teachers in regard to these matters.

540. Implications of variations of policy and practice among different authorities within the Federal Republic. As previously noted, while the relevant provisions of the Basic Law, legislation and collective agreements establish standards in regard to the duty of faithfulness to the free democratic basic order which are of general application, considerable differences of policy and practice exist in the implementation of those provisions. In the comments submitted by the Federal Government in June 1986, it admitted the existence of differences. However, the Government considered that only the Constitution and laws of the Federal Republic and the administrative practice followed on the basis thereof by the majority of Länder could be the yardstick for the present inquiry. It observed that, if particular Länder for political or tactical reasons decided differently in individual cases in favour of those concerned, that fact could have no influence on the question whether the manner of application adopted by the Federal Government corresponds to national law and on whether that law is in conformity with Convention No. 111.

541. In this connection, the Commission recalls the indications already given (Endnote 227) regarding the obligations assumed by a State which has ratified Convention No. 111, under article 19 of the ILO Constitution and under Articles 2 and 3 of the Convention, to ensure that both law and practice are consistent with the Convention, to pursue a national policy designed to bring this about and to modify any administrative instructions or practices which are inconsistent with that policy. Where divergent practices are followed by different authorities within a federal state, the question of compatibility with the Convention is not determined by what may be majority practice. The position of the various authorities has to be considered, in terms of its consistency with the Convention.

542. Furthermore, the actual experience in following specific policies or practices can provide a valuable insight into the question of what conditions can properly be regarded as inherent requirements of particular jobs.

543. As previously indicated, (Endnote 228) the existing differences in the manner of implementing the provisions governing the duty of faithfulness to the free democratic basic order are a reflection of texts governing the procedure for verification of faithfulness to the Constitution (which also embody criteria of a substantive nature) and of the policies and practices actually applied in judging applications for employment in the public service and in deciding upon the acceptability of particular political activities or affiliations by those already in the public service. One group of Länder (Bremen, Hamburg, Hessen, North Rhine-Westphalia, Saarland), which account for some 26 million of the Federal Republic's total population of 61 million, have in the past five or six years adopted an approach in the matter which appears largely to have eliminated conflict and controversy. The measures taken have included the reconsideration of cases in which employment or the granting of appointments as officials had previously been refused, apparently resulting in many instances in decisions favourable to those concerned. Another group of Länder (Baden-Württemberg, Bavaria, Lower Saxony, Rhineland-Palatinate, Schleswig-Holstein) apply more stringent tests. As a result, political activities and affiliations which in one part of the Federal Republic are not considered to constitute a bar to admission to and employment in the public service are, in another part of the country, the basis for exclusion from the public service. In Lower Saxony, there has also been variation in practice over time. Activities which at an earlier period were considered not to call for disciplinary measures (such as standing as a candidate for certain political parties at elections or holding office in such parties) have subsequently been considered by the Land authorities to be incompatible with the duty of faithfulness and to call for disciplinary measures.

544. In the case of federal employment, although the principles for the verification of faithfulness to the Constitution now in force correspond essentially to those of the first group of Länder (and indeed were the model for the texts of several of those Länder), a number of current cases in which proceedings for dismissal are pending and the officials concerned have in the meantime been suspended relate to facts which, in the said Länder, would not be regarded as calling for any disciplinary

measures. That fact is reflected, for example, in the resolution adopted by the Hessen Land Parliament in January 1985 protesting against measures taken by the Federal Minister of Posts against several postal officials working in Hessen and emphasising that the exercise of civil rights, such as standing as a candidate in local, Land and federal elections and the exercise of a corresponding elective mandate should not lead to any prejudice in official service.

545. Having regard to the above-mentioned differences of approach, the Commission, both during the hearing of witnesses and during its visit to the Federal Republic of Germany, inquired systematically whether any difficulties in the functioning of public services had been observed as a result of the application of the less restrictive policy followed in certain Länder or, in Lower Saxony, at an earlier period. No evidence of any adverse effects was forthcoming. During the Commission's visit to the Federal Republic, the authorities of Hessen, North Rhine-Westphalia and Saarland stated that no difficulties had been encountered. It would accordingly appear that the more stringent test adopted by other authorities establishes conditions that go further than is necessary for the proper functioning of the public service.

546. 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. The documented cases brought to the Commission's attention included several in which officials had been dismissed from the public service on account of violation of the duty of faithfulness and a substantially larger number of cases in which proceedings with a view to such dismissal are still pending. In many instances, the officials concerned had been in the public service for long periods and, apart from the political activities on which the disciplinary measures against them were based, their performance of their duties had not been the subject of reproach.

547. In questions to the witnesses who appeared before it, the Commission systematically sought information on whether the activities which were the basis of allegations of violation of the duty of faithfulness had had an adverse effect on the performance of the specific duties of the persons concerned or on the functioning of the services in question. Concordant evidence was given that no such adverse effects had manifested themselves in the cases of which particulars had been communicated to the Commission by the WFTU, trade unions or the individuals concerned.

548. Some references were made to instances in which teachers had sought to indoctrinate their pupils. Thus, in the comments submitted in March 1986, the Government referred to distribution to pupils of literature denying Nazi crimes (Luthardt case in Lower Saxony) and to the publication by a university lecturer of a book containing extreme right-wing views (case of Kosiek). The Chief of the Office for the Protection of the Constitution of Lower Saxony, when giving evidence before the Commission, produced documents concerning attempted indoctrination by several teachers who were members of the KBW, a Maoist group now dissolved. He stated that no cases were known to him in which teachers belonging to the DKP had tried to indoctrinate in their teaching. (Endnote 229)

549. These indications suggest that, while abuse of functions may take place in individual cases, it can be and in practice has been the subject of disciplinary measures as constituting a breach of other service obligations; however, the likelihood that abuse will occur cannot be presumed from particular political views or affiliations. That conclusion finds support in the facts of the bulk of cases brought to the Commission's attention by the WFTU, trade unions or the individuals concerned.

550. The above-mentioned evidence is also borne out by a variety of specific situations. In a number of instances, proceedings for violation of the duty of faithfulness were started only a long time (sometimes, eight or ten years) after the alleged activities began. (Endnote 230) Frequently, while proceedings were pending, officials - in almost all cases, teachers - whom it was sought to dismiss because of their political activities continued to perform their functions, at times for as long as ten or 12 years. (Endnote 231) In none of these cases was it suggested that the delay in initiating action on the alleged breaches of the duty of faithfulness or the maintenance in service of persons against whom proceedings were pending had adversely affected the performance of the tasks assigned to those concerned or the functioning of the services (e.g. postal services and education) in which they were working.

551. In the case of one group of officials, systematic use has been made in recent years of the power to suspend officials pending a final decision by the competent courts (i.e. in the Federal Postal Service). In explanation of these suspensions it was stated that the great majority of officials in the Federal Postal Service and the public would not understand why an official accused of serious violations of his duties likely to lead to dismissal should be allowed to remain in the service. The Chief of the

Department for Personnel Matters in the Federal Ministry of Posts and Telecommunications, in reply to questions put by the Commission, indicated that there had been no criticism of the manner in which the officials concerned had performed their work, which had been the subject of favourable appraisal; that there was no evidence that their political activities had adversely affected the performance of their work; that they had not attempted to misuse their position or functions in the public service for political purposes or been guilty of other improper conduct in the service; that the political activities engaged in by the officials concerned had created no difficulties with colleagues or superiors or with the public and had in no way affected the functioning of the postal service. He observed that these various considerations were not decisive, since the basis of the allegations against the officials was their deficient attitude towards the Constitution.

552. In the light of the foregoing indications, except in cases of misconduct (such as attempted indoctrination of pupils by teachers), it has not been established that continuing service by the various persons concerned would adversely affect the functioning of public services.

553. The preceding conclusion is borne out by the solution adopted for a group of officials of the Federal Railways against whom disciplinary proceedings on account of activities within the DKP had been initiated. According to evidence given before the Commission, and confirmed by the Federal Disciplinary Prosecutor, these proceedings had been discontinued several years ago when those concerned agreed to give up their appointments as officials and to be employed instead under labour contracts. (Endnote 232) Their continued employment by the Federal Railways was stated not to have given rise to any difficulty. There is no reason to suppose that the result would have been any different had they continued to serve with their original status as officials.

554. 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. The Government of the Federal Republic has observed that arguments based on the absence of any recognisable consequences on the functioning of public services of the political activities of persons accused of breach of the duty of faithfulness to the Constitution miss the real point, namely, the need to safeguard the State and its institutions in times of conflict or crisis. It has also stressed the need to take into consideration the specific historical and geographic situation of the Federal Republic. (Endnote 233)

555. During the hearing of witnesses, the Commission asked the Federal Disciplinary Prosecutor whether, in the history of the Federal Republic, there had been situations of crisis or conflict of the kind envisaged in the Government's comments. He replied in the negative. He also confirmed that there exist laws which would permit special measures to be taken to ensure the security of the State and the functioning of public services in times of emergency, but emphasised the importance of precautionary measures to prevent the infiltration of the institutions of the State. (Endnote 234)

556. In relation to these observations, it is appropriate to bear in mind once again the principles of necessity and proportionality. They are recognised criteria for testing the justification for restrictions on individual rights in periods of emergency, (Endnote 235) and are all the more relevant where restrictions are resorted to by way of precaution against potential emergencies. In this connection, the Commission recalls its earlier remarks that attachment to the basic constitutional order may be regarded as an inherent job requirement, within the meaning of Article 1, paragraph 2, of Convention No. 111, for employment in certain areas requiring particularly secure guarantees of loyalty and reliability of their personnel, such as diplomatic and defence services, as well as for particular positions in other sectors of the public service in which, on account of the nature of the functions involved, corresponding safeguards are necessary. In that context, the specific historical and geographic situation of the Federal Republic of Germany may be taken into account. It follows that the restrictions imposed on the above-mentioned grounds should not be extended to the employment of officials in the public service generally.

557. The undifferentiated application to all officials of the duty of faithfulness. In its decision of 22 May 1975, the Federal Constitutional Court ruled that the duty of faithfulness to the free democratic basic order applies to every official, without differentiation according to his functions. The Government, in its comments, has insisted on the need for such undifferentiated application of the duty of faithfulness, as a necessary qualification of fitness for employment. (Endnote 236) It was also repeatedly stressed by the witnesses who gave evidence before the Commission on behalf of the Government or who supported its position that it was not possible to differentiate in this matter according to the particular position or function held or exercised. They referred to the practical difficulties which would arise if it were sought to distinguish among different public

servants according to their degree of faithfulness and to the importance for the public authorities to be able to transfer and to promote public servants freely, without having to consider whether they were sufficiently faithful to assume the particular responsibilities concerned. (Endnote 237)

558. The foregoing arguments in effect restate the view that the undifferentiated application of the duty of faithfulness to the free democratic basic order corresponds to the inherent requirements of the totality of jobs in the public service occupied by officials, this time not as a matter of interpretation of the scope of Article 1, paragraph 2, of Convention No. 111, but rather as a question of fact. The Commission refers to the observations already made on this question. (Endnote 238) It would appear difficult to consider that political activities or affiliations of the kind involved in the various cases brought to its attention call into question an individual's suitability to serve as an official in any position in a sector covering a wide range of activities in public administration at different levels and in the provision of public services such as posts and telecommunications, railways, education, health and social welfare services. Nor can it be assumed in the case of the particular qualification involved - any more than with other job requirements, whether technical, linguistic, moral or of personality - that every applicant must have the potential for transfer or promotion to any position in this extensive sector.

559. In the comments submitted to the Commission, the Government of the Federal Republic emphasised that the principle of proportionality is a fundamental principle of the country's administrative law. Some lawyers in the Federal Republic consider that, by virtue of that principle, the question of compliance with the duty of faithfulness to the basic order ought in each case to be examined by reference to the actual conduct of the person concerned and its implications for his ability to assume and exercise the functions of the specific post involved. (Endnote 239) During a debate in the Federal Diet in January 1986, the spokesman of the Free Democratic Party, Dr. Hirsch (a former holder of ministerial responsibility in North Rhine-Westphalia) regretted that the question of the principle of proportionality was not expressly regulated in relation to the duty of faithfulness to the Constitution. He observed that, in actual life, there were differences between a postal official who sold stamps, a teacher, a judge and the President of the Federal Office for the Protection of the Constitution; one might well ignore things done by some of them which for others were not acceptable. (Endnote 240)

560. The feasibility of differentiating in the application of the duty of faithfulness according to the nature of the functions concerned is shown by various situations already to be found in the Federal Republic. The Land of Bremen, in its provisions governing verification of faithfulness to the Constitution, expressly requires that, in judging whether a public servant's conduct outside the service justifies disciplinary measures, regard shall be had to the nature and extent of that conduct and to the tasks assigned to the public servant. The Commission was given to understand during its discussions with the authorities of certain other Länder that a similar approach would be taken there in considering compliance with the duty of faithfulness.

561. It is also to be noted that, in applying the distinct system of security checks - where the question of reliability in terms of outlook is also among the factors to be considered in judging suitability for employment and where questions of transferability and possible promotion likewise arise - regard is had to the nature of the job.

562. Special significance attaches to the fact that, in the case of public servants employed under labour contracts (*Angestellte* and *Arbeiter*), the labour courts distinguish according to the nature of the specific functions in judging compliance with the duty of faithfulness to the free democratic basic order, which is provided for in collective agreements. This difference of approach, as compared with that of administrative courts in cases concerning officials (*Beamte*), is based on the following considerations. While, for officials, the duty of faithfulness is considered as a constitutional principle derived from Article 33, paragraph 5, of the Basic Law, in the case of public servants employed under labour contracts the matter has to be considered under paragraph 2 of the same Article. That provision guarantees all Germans equal access to every public post according to their ability, qualifications and occupational performance. The labour courts have considered compliance with the duty of faithfulness by persons employed under labour contracts as a question of satisfying qualifications within the meaning of Article 33, paragraph 2, and therefore as calling for examination in the light of the nature of the job concerned.

563. Given the difference in judging suitability for employment of officials and of public servants engaged under labour contracts, the Commission was concerned to ascertain, particularly during the hearing of witnesses, whether the tasks assigned to these respective categories were distinguishable. The Basic Law envisages that officials should in principle be assigned functions involving the exercise of sovereign powers. It emerged from the evidence heard by the Commission, however, that in

practice there is no clear distinction between the functions assigned to officials and those assigned to public servants employed under a labour contract. (Endnote 241) Whether a particular position is occupied under one or other status is affected by a variety of considerations other than the nature of the functions, including the varying personnel and budgetary policies pursued by different authorities and at different times. As a result, one finds, for example, that the proportion of officials employed by the Federal Railways, the Federal Postal Service and the authorities of the Länder (56 to 57 per cent) is substantially higher than in the federal administration (35 per cent).

564. It thus appears that the difference of approach in the application of the duty of faithfulness adopted for the two categories in question - officials and persons under labour contracts - results from considerations of legal status, rather than functions. If the requirements of faithfulness are capable of differentiation according to the nature of the work performed in the case of public servants employed under labour contracts, this should also be feasible in the case of officials.

565. The foregoing conclusion tends to be confirmed by the experience of other countries. In a comparative study of 15 other (mainly European) countries published in the Federal Republic in 1981, it was observed that "in so far as the duty of faithfulness to the constitutional order exists at all, it is conceived not in an abstract manner, but functionally and related to the post. The Federal Republic of Germany, with its general duty of faithfulness, departs significantly from this Western European common denominator". (Endnote 242) The information available to the Commission tends to bear out that conclusion.

566. The special situation of teachers in regard to the duty of faithfulness. The majority of cases of exclusion from the public service brought to the attention of the Commission concern teachers. The Government of the Federal Republic, and several of the witnesses who appeared before the Commission, emphasised the special responsibilities which fall upon teachers in upholding the principles of the free democratic basic order and the vulnerability of pupils to influence by teachers hostile to those values. In the comments presented by the Government in March 1986, it drew attention to the observations made by the European Commission of Human Rights on the special duties and responsibilities of a teacher in relation to the expression of opinions, both directly at school and to a lesser degree, as a figure of authority, at other times. As already noted, the Government also referred to cases in which a teacher had distributed to his pupils materials denying the crimes of the Third Reich and to the publication by a university lecturer of books with extreme right-wing content, and asked whether such persons could remain teachers. Similarly, it asked whether a person could become or remain a teacher who publicly, and therefore also to the knowledge of his pupils, advocated the elimination of the free democratic basic order by standing as a candidate for or holding office in an extremist party. It emphasised that pupils would not be able to distinguish between propaganda for the aims of a party hostile to the Constitution according to whether it was made during lessons or in the street outside school hours. (Endnote 243)

567. It appears appropriate to examine these considerations in the light of the facts of the actual cases concerning teachers brought to the attention of the Commission. Where it has been sought to exclude from employment teachers who have already served (either by way of preparatory service or as qualified teachers), it is only exceptionally that any allegation has been made that they had sought to indoctrinate their pupils or had otherwise misconducted themselves in their service. In numerous instances, there has been express recognition, in performance appraisals or court decisions, of their correct conduct in these respects. As already noted, the Chief of the Office for the Protection of the Constitution of Lower Saxony, while giving information concerning cases of attempted political indoctrination which had occurred in that Land, stated that no cases of this kind were known to him involving teachers belonging to the DKP. It further appears from the documentation submitted to the Commission and from the evidence heard by it that the measures to exclude the individuals concerned from the public service have not been grounded on either illegal or unconstitutional conduct in their political activities. (Endnote 244) Nor, in the cases submitted by the WFTU, trade unions or the individuals affected, was it alleged that those concerned had made pronouncements advocating the elimination of the free democratic basic order or hostile to that order. The charges formulated to sustain the accusation of breach of the duty of faithfulness generally refer to membership and activity in a particular party or organisation as such - for example, standing as a candidate in elections, holding of office, attendance at meetings or the writing of articles for publications of the party or organisation - without any mention of the content of what the person concerned may have said or written.

568. In the light of these facts, the Commission considers it appropriate to make the following comments. A teacher obviously has a duty not to abuse his function by indoctrination or other improper influence on his pupils. Further, in activities

and statements outside his service, he must bear in mind the compatibility of what he does and says with his responsibilities. When he violates these duties, he can be subject to disciplinary measures quite apart from any general duty of faithfulness to the basic order. Whether a breach of duty has been committed must however be determined on the basis of actual conduct. There can be no justification to assume that, because a teacher is active in a particular party or organisation, he will behave in a manner incompatible with his obligations.

569. The Commission recognises that public activities undertaken by a teacher and known to his pupils may exert an influence on the latter. That, however, applies to all teachers, whatever their political orientation, and raises the wider issue of the role which it may be appropriate to permit teachers to play in public life. Guidance on this question is provided by the Recommendation concerning the Status of Teachers, adopted in October 1966 by a Special Intergovernmental Conference convened by UNESCO, in collaboration with the ILO. According to paragraphs 79 and 80 of this Recommendation, "the participation of teachers in social and public life should be encouraged in the interests of the teacher's personal development, of the educational service and of society as a whole" and "teachers should be free to exercise all civic rights generally enjoyed by citizens and should be eligible for public office". In the Federal Republic of Germany teachers are indeed free to participate in public life. Where that is the case, it would not be appropriate to make any general distinction according to the supposed acceptability of the respective political orientations. It is to be noted that one is dealing here with lawful organisations entitled to participate in the political life and constitutional processes of the country.

570. In the light of the preceding considerations, it appears to the Commission that in most of the cases concerning teachers brought to its attention, the justification for the measures taken, whether involving exclusion or attempted exclusion from the public service or the imposition of disciplinary penalties, has not been established.

571. One more specific issue calls for comment, namely, the problems experienced in certain Länder in gaining access to the preparatory service which constitutes part of the training required to qualify as a teacher. The Commission's attention was drawn in particular to difficulties encountered in Baden-Württemberg and Bavaria by persons who had been active in certain left-wing political organisations during their student period in obtaining admission to the preparatory service for teachers. Considerable litigation has taken place with a view to recognition of the right to such training, based on the ruling of the Federal Constitutional Court in its decision of 22 May 1975 that, where a period of employment in the public service is required as a condition for qualifying for occupations which may also be exercised outside the public service, facilities for such training must be provided. Both the above-mentioned Länder have adopted requirements that preparatory service by teachers must in all cases be performed with the status of official, and have invoked the strict requirements of faithfulness to the free democratic basic order to refuse admission to preparatory service in circumstances where labour courts had previously recognised a right to perform such service as an employee under a labour contract. In a decision of 1982, the Land Labour Court of Baden-Württemberg expressed doubt as to why such a condition should be imposed, since it was the long-established practice of the Land authorities to employ teachers who had completed their training also under labour contracts. The authorities of Baden-Württemberg, in discussing this matter with the Commission, observed that the 1975 decision of the Federal Constitutional Court concerned preparatory service by lawyers, and therefore was not directly applicable in the case of teachers. However, the Federal Labour Court in decisions of 2 October 1986 held that the authorities of Baden-Württemberg must provide an opportunity for preparatory training for teachers, even in cases in which doubts as to the applicant's faithfulness to the Constitution exist. The Commission supposes that these decisions will secure a solution to this particular problem. In the case of Bavaria, the same issue remains to be ruled upon by the Federal Labour Court.

572. Even if the question of admission to preparatory service of teachers is resolved, the problem of admission to employment once training has been completed remains. In this regard, the Commission refers to the observations which it has made concerning the bearing of particular political activities or affiliations on employment of teachers in the public service.

573. General conclusion regarding the application of Article 1, paragraph 2, of Convention No. 111. It may be useful to recapitulate the points emerging from the preceding examination of the various aspects relevant to evaluating the justification for the measures taken in the Federal Republic of Germany in terms of Article 1, paragraph 2. From an examination of variations in policy and practice among different authorities within the Federal Republic in applying the provisions on the duty of faithfulness to the free democratic basic order, it appears that the more stringent test adopted by the authorities of certain Länder, as well as in certain services at the federal level, establishes conditions that go further than is necessary for the proper

functioning of the public service. In the specific cases brought to the attention of the Commission, except in some instances of misconduct mentioned by the Government or its witnesses, the activities on the basis of which it has been sought to remove persons from the public service appear not to have had any adverse effect on the performance of their duties or on the functioning of the services in question, and it has not been established that continuing service by those concerned would have such adverse effects. The concern to ensure the functioning of the public service in times of crisis or conflict would permit the public authorities to consider political reliability to constitute an inherent requirement for employment in certain positions, having regard to the nature of the functions involved; such a condition should, however, not be extended to the employment of officials in the public service generally. The undifferentiated application of the duty of faithfulness to all officials, without regard to the effect which their political attitude or activities may have on the exercise of the functions assigned to them, does not appear to correspond to the inherent requirements of all the kinds of work involved. From an examination of the cases brought to the Commission's attention concerning teachers, who are the main occupational group affected by measures based on the duty of faithfulness, it appears that in most cases the justification for their exclusion from the public service or other measures involved has not been established. In the light of the foregoing considerations, the Commission concludes that the measures taken in application of the duty of faithfulness to the free democratic basic order have in various respects not remained within the limits of the restrictions authorised by Article 1, paragraph 2, of Convention No. 111 on the basis of the inherent requirements of particular jobs.

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. The Government of the Federal Republic of Germany has observed that the free democratic basic order is the essential core of the State and constitutional order of the Federal Republic, and that an attack on this core is prejudicial to the security of the State within the meaning of Article 4 of Convention No. 111. The Government has also observed that, in considering this question, it is necessary to refer to the particular circumstances of each State. In the light of the specific geographic situation and historical experiences of the Federal Republic, the Government considers that the measures taken in application of the duty of faithfulness to the free democratic basic order fall within the exception provided for in Article 4. (Endnote 245)

575. By virtue of Article 4, "any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice".

576. In Chapter 3, the Commission noted observations concerning the scope of these provisions made by the Committee of Experts on the Application of Conventions and Recommendations. That Committee has pointed out, more particularly, that the exception has to be based on "activities" prejudicial to the security of the State (which must be proved or justifiably suspected on sufficiently serious grounds) as distinct from intentions; that any measures taken not because of individual activities but by reason of membership of a particular group or community constitute discrimination within the scope of the Convention; and that the definition of "the security of the State" should be sufficiently narrow to avoid the risk of coming into conflict with the non-discrimination policy called for by the Convention.

577. Some comment appears appropriate on the relationship between the exception provided for in Article 1, paragraph 2, of the Convention and that covered by Article 4. Considerations relating to the security of the State may justify the imposition of special conditions of reliability, integrity and loyalty for employment in given positions. Where it can be established that such conditions are required by the nature of the work or functions concerned, they may be regarded as inherent job requirements within the meaning of Article 1, paragraph 2. In that case, they may be imposed even if the specific criterion mentioned in Article 4 - namely, justifiable suspicion of, or actual engagement in, activities prejudicial to the security of the State - is not met. That, however, underlines the importance of one of the above-mentioned points made by the Committee of Experts, namely that, in applying Article 4 of the Convention, cases in which there exists proof or justifiable suspicion on sufficiently serious grounds that the persons concerned have undertaken activities prejudicial to the security of the State must be distinguished from mere intentions. In this context, too, regard must be had to the principles of necessity and proportionality.

578. In none of the cases brought to the attention of the Commission has any allegation been made that the individuals concerned had engaged in activities prejudicial to the security of the State. In evidence before the Commission, this fact was

confirmed, for example, for their respective areas of competence, by the Federal Disciplinary Prosecutor and by the Chief of the Department for Personnel Matters of the Ministry of Posts and Telecommunications. (Endnote 246) What has been involved in all cases is open and lawful political activity. Where those concerned have stood as candidates in elections or have exercised an elective mandate, they have done so in conformity with the normal electoral process and in pursuance of their constitutional rights. No reproach as to their actual conduct in the course of these activities was made. The accusation of identification with aims hostile to the basic order has been founded on an evaluation of the presumed intentions of the party or organisation with which they were associated; except in one respect (which is examined below), reference was not made to any specific acts directed against the basic order.

579. In considering cases of exclusion from the public service of persons associated with the German Communist Party (DKP), the public authorities have placed reliance not only on the aims of the party as emerging from its programme, but have also stated that the party defamed the existing constitutional order. They have referred in this connection, for example, to criticism of the existing economic order and its description as one of "capitalist exploitation", to the campaign against so-called "Berufsverbote", and to the special emphasis on negative manifestations in the life of the Federal Republic without mention of its positive achievements. (Endnote 247) It would appear that what is involved here is essentially the expression of political views, not activities prejudicial to the security of the State within the meaning of Article 4 of the Convention.

580. It may be noted that in some of the cases brought to the Commission's attention the persons concerned have been transferred because it was considered desirable to assign them to work which was not security sensitive. However, among the cases known to the Commission in which, on the basis of the provisions relating to the duty of faithfulness, admission to public employment has been refused or measures have been taken to exclude a public servant from employment, in no instance has it been sought to justify the decision on the ground of the security sensitive nature of available work. It is particularly evident that considerations of this kind played no role in the many cases concerning teachers.

581. In all the circumstances, the Commission considers that the measures taken in application of the duty of faithfulness to the free democratic basic order, as exemplified by the cases brought to its attention, do not fall within the exception provided for in Article 4 of the Convention.

Recommendations

582. Having regard to the preceding conclusions, the Commission is called upon to formulate recommendations on the measures which it deems appropriate to overcome the existing difficulties in the application of Convention No. 111. The Commission wishes to emphasise that, in considering these recommendations, it has fully recognised the value and importance of the provisions embodied in the Basic Law of the Federal Republic of Germany which guarantee individual rights and freedoms and lay the foundations for a democratic State based on the rule of law. Nor does the Commission wish to call into question the legitimacy of the authorities' desire to protect and maintain these essential features of the country's constitutional order. What is at stake is how to circumscribe the measures taken so as to ensure a proper balance between the rights and freedoms of the individual and the interests of the community at large.

583. One may recall, in this connection, that the Federal Constitutional Court, in its decision of 22 May 1975, pointed out the danger that an unduly strict approach in this matter might poison the political atmosphere, impair confidence in democracy and discredit the free State. That warning was echoed by the Federal Diet in a resolution in October 1975 and by the Federal Government when it issued revised guide-lines in January 1979. The adoption of an approach that starts from a presumption that citizens are faithful to the basic order, that calls that presumption into question only where justified by sufficiently serious facts, that sees involvement in political life and constitutional processes as a sign of adherence to, rather than as rejection of, the basic constitutional order, may bring about a firmer integration in the body politic of all elements in society.

584. The Commission recommends that the existing measures relating to the duty of faithfulness to the free democratic basic order be re-examined by the various authorities in the Federal Republic, with due regard to the conclusions stated by the Commission, and that action be taken to ensure that only such restrictions on employment in the public service are maintained as correspond to the inherent requirements of particular jobs, within the meaning of Article 1, paragraph 2, of Convention No. 111 or can be justified under the terms of Article 4 of the Convention.

585. The Commission recommends that, in that connection, the following considerations be taken into account. The essential issue should be regarded as that of fitness for employment (as indeed the Federal Government itself suggested in its comments of June 1986). Article 33, paragraph 2, of the Basic Law already establishes that "every German shall have equal access to every public post, according to his ability, qualifications and occupational performance". In this connection, the principle of proportionality - which has been stated to form part of the administrative law of the Federal Republic - should be observed. That principle implies, in the first instance, that public servants should be subject to no greater limitations in the enjoyment of rights and freedoms accorded to citizens in general than can be shown to be necessary to ensure the functioning of the institutions of the State and of public services. As the Commission has already indicated, it also follows from the principle of proportionality that whether an applicant for a position in the public service or a public servant is fit for admission to employment or for continued employment must, in each instance, be judged by reference to the functions of the specific post concerned and the implications of the actual conduct of the individual for his ability to assume and exercise those functions.

586. In taking the above-mentioned measures, guidance may be obtained from various policies, practices and decisions already to be found in the Federal Republic of Germany. Thus, one may refer to the approach adopted by certain Länder, characterised, amongst other things, by the presumption of faithfulness of applicants for employment in the public service and by not considering activities on behalf of lawful political parties as inconsistent with faithfulness to the basic order in the absence of specific conduct incompatible with the duties of the position involved. As regards persons already employed in the public service, regard may also be had to the provisions contained in the bill presented to the Federal Diet in 1982, according to which account was to be taken, in judging the disciplinary implications of a public servant's out-of-service conduct, of the nature and extent of that conduct, the tasks assigned to the person concerned and his fundamental rights, in particular, freedom of expression. (Endnote 248)

587. In the case of applicants for employment in the public service, it appears important not to attribute excessive importance to activities undertaken at a time when they were not bound by any public service relationship and to provide an opportunity for them to demonstrate that, once they have entered into such a relationship, they will respect the obligations attaching thereto. It may be borne in mind that, as a result of the probationary nature of initial appointments as officials and the period of preparatory service in public employment which is required as part of training for various professions, actual conduct in the public service can normally be observed and evaluated during a period of from five to seven years before a decision need be taken whether to grant an appointment as official for life, with its far-reaching degree of job security.

588. The preceding observations show that there may be different means by which the situation in the Federal Republic may be brought into full conformity with the requirements of Convention No. 111. It is recalled that the Länder which have adopted a less stringent approach to the implementation of the duty of faithfulness have done so by means of decisions not involving amendment of the legislative provisions governing that duty. It is therefore for the Federal Government and the authorities of the various Länder to consider the exact nature of the measures through which the full observance of the Convention in this matter may be made effective. It should, however, be borne in mind that, according to Article 3(b) of the Convention, ratifying States undertake "to enact such legislation ... as may be calculated to secure the acceptance and observance" of the national policy of equality of opportunity and treatment in respect of employment and occupation. The Commission accordingly recommends that, if the requisite changes cannot be brought about by other means, appropriate legislative action be taken.

589. The Commission considers it desirable that, as far as possible, uniform criteria in the matter under consideration be applied throughout the Federal Republic in judging fitness for employment in the public service, and that these criteria be embodied in texts which will secure their application, irrespective of the political complexion at a given time of the various employing authorities concerned. They should also be made effective at the level of local authorities.

590. In the case of persons employed in the public service under labour contracts, the duty of faithfulness is regulated not by law but by collective agreement. The Commission recommends that the requisite adaptations be also made in the treatment of these public servants. This will evidently involve consultation and negotiation with the trade unions representing the workers concerned.

591. The Commission recalls that, under Article 3(a) of Convention No. 111, ratifying States should seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of the

national policy of equality of opportunity and treatment in respect of employment and occupation. It would therefore be appropriate to consult the organisations in question (especially the trade unions representing persons employed in the public service) on the various measures designed to give effect to the recommendations made by the Commission.

592. The Commission is not called upon to consider individually the cases arising out of the application of the provisions on the duty of faithfulness which have been brought to its attention. It is evident, however, that measures adopted in response to the preceding recommendations may have implications for the disposal of a number of such cases which are currently pending. It will be for the authorities concerned to examine those implications. The Commission recalls, furthermore, that in certain instances where authorities have in recent years modified their approach in the matter, they have provided an opportunity to persons affected by measures taken in pursuance of previous policies to be newly considered for employment. It recommends that competent authorities elsewhere give consideration to similar arrangements.

593. According to article 28 of the ILO Constitution, the Commission is required to indicate the time within which the steps recommended by it should be taken. It realises that extensive consultations with various authorities and other interested parties will be required to determine the measures to be taken and that the time within which the necessary decisions can be taken will also depend on the nature of those measures. In these circumstances, the Commission considers it advisable not to suggest a precise timetable for action. It recommends that the measures in question be taken as soon as practicable, and that the Federal Government give detailed information on all relevant developments in the annual reports on the application of Convention No. 111, presented in pursuance of article 22 of the ILO Constitution.

594. The Commission wishes to express its appreciation of the collaboration which it has received from the authorities of the Federal Republic of Germany throughout the present inquiry and of their clearly expressed desire to respect the country's obligations under the Constitution and the Conventions of the International Labour Organisation. The detailed information and arguments which the Federal Government has presented to the Commission have greatly assisted it in obtaining a clear understanding of the situation and of the issues calling for determination. The Commission is confident that a similarly constructive approach in considering the conclusions and recommendations set out in this report will serve to reinforce international co-operation while at the same time removing from controversy an issue which, both within the country and beyond its borders, may have presented an image of a democratic order less firmly rooted than is in fact warranted by 40 years of remarkable achievements.

Geneva, 26 November 1986 (Signed) Voitto Saario

Chairman

Dietrich Schindler

Caracas, 5 December 1986.

(Signed) Gonzalo Parra-Aranguren

Professor Parra-Aranguren signed the report subject to the following dissenting opinion:

GONZALO PARRA-ARANGUREN dissents from the opinion of the majority of the Commission, among others, because of the following reasons:

First: The undersigned firmly believes in the existence of peremptory rules of Public International Law, that are obligatory to the States and that cannot be abrogated or modified by Treaties, bilateral or multilateral. This standpoint, generally accepted nowadays, found clear expression in the Vienna Convention on the Law of Treaties (23 May 1969), where article 53 declares a Treaty void "if, at the time of its conclusion, it conflicts with a peremptory norm of general international law", i.e. one "accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Moreover, article 64 provides that "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates".

Certainly, it still is a matter of discussion which are to be considered peremptory rules of general international law, question that was not answered by the Vienna Convention. This situation may create difficulties in certain juridical areas, but the undersigned believes that there cannot be the slightest doubt, to accept that rules recognising fundamental rights of the human being must qualify as part of the *jus cogens*, and, therefore, every single State has to obey and respect them, not only in its relations with other States but also in regard to the international community.

Second: The Federal Republic of Germany, as is mentioned in Chapter 10, paragraph 506, among other defences argued that the measures object of examination by the Commission were taken "to protect the basic features of the free democratic basic order, and considers that an ILO Convention, aimed at guaranteeing human rights, should not be interpreted as to protect persons who advocate a totalitarian system"; and in support of this argument it referred to Article 5, paragraph 1, of the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966.

The majority of the Commission rejected this argument, and, after stating that "it appears appropriate to note that the structure and approach adopted respectively in the International Covenants on Human Rights and in ILO Convention No. 111 are significantly different", in paragraph 507 comes to the following conclusions:

ILO Convention No. 111 is confined to the specific question of equality of opportunity and treatment in employment and occupation. It sets out in some detail the action to be taken by governments with a view to eliminating discrimination in that field. It defines what is to be considered as discrimination for the purpose of the Convention, and expressly identifies certain circumstances which shall not be so considered. It would appear difficult to read into the Convention, in addition to the express exception clauses, an implied exception drawn from other, very differently conceived instruments. It is, moreover, to be noted that difficulties have been encountered in determining the precise scope and effect of the provision in the Covenants to which the government has referred.

Third: The foregoing conclusion cannot be accepted by the undersigned, because, in his opinion, every Treaty, bilateral or multilateral, has to respect peremptory rules of general international law, in this particular case, those declaring fundamental rights of the human being. Consequently, the question is not one of accepting a new implied exception to Convention No. 111, but that Convention No. 111 has to respect and be read within the frame established by the norms of *jus cogens*, and that Convention No. 111 cannot be interpreted to protect individuals advocating, even by peaceful means, ideas that are against fundamental rights of the human being, because those ideas contradict rights recognised by peremptory rules of general international law.

Fourth: It is true that the Federal Republic of Germany, in support of its allegation, has only argued the eventual application of Article 5, paragraph 1, of the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, but, according to the undersigned, the question to be decided by the Commission is a broader one that deals with the inter-relation between Treaties and the rules of *jus cogens* of general international law. Consequently, the argument under examination cannot be rejected, as the majority of the Commission does, by stating that "the structure and approach" adopted by both Conventions are "significantly different". This reasoning leaves unanswered the more important question related to the necessary subordination of Convention No. 111 to the peremptory rules of general international law, that declare fundamental rights of the human being; subordination that is even more evident in the case of Convention No. 111, in view of its historical background and of the objectives pursued by the ILO, as are summarised in Chapter 3, paragraphs 67 to 71.

Fifth: The majority of the Commission sustain (paragraph 508) that the individual conduct "aimed at the destruction of rights and basic freedoms" can only be subject to "conviction and punishment under penal law". The undersigned does not agree with such affirmation, because he believes that, besides criminal punishment, such conduct cannot be protected by any Treaty, even less by Convention No. 111, since it is contrary to specific commandments of peremptory rules of general international law.

Sixth: It is also not acceptable to the undersigned the affirmation of the majority of the Commission (paragraph 509) that the cases involved deal "with persons who have behaved lawfully and are in full enjoyment of their civic rights". It results very strange to sustain that a conduct is lawful without having examined whether or not the behaviour in question advocates the contravention of peremptory rules of general international law, consecrating fundamental rights of the human being that constitute the basis of the free democratic order, as they are expressed in the Constitution of the Federal Republic of Germany.

Seventh: In paragraph 518, the majority of the Commission refers to some allegations made by the Federal Republic of Germany, and in paragraph 519 adds:

The above arguments raise a number of questions. Among them is the issue whether the programme of the DKP, and of other parties or organisations considered to have aims hostile to the Constitution, would involve changes in any of the intangible provisions of the Basic Law and, if so, whether this would lead the party or organisation into action of an unconstitutional nature or, on the contrary, would impose legal limits on the action which might be taken. The Commission finds it unnecessary to enter into these issues in the present context - namely, consideration of the scope of the definition of discrimination in Article 1, paragraph 1, of the Convention. The decisive question to be considered here is whether one can exclude from the aforesaid definition, and therefore wholly from the scope of Convention No. 111, the advocacy and pursuit of political aims in a form which everyone admits to be lawful ... That, however, is an issue which calls for consideration in regard to Article 1, paragraph 2 (distinctions based on the inherent requirements of particular jobs); it does not appear to justify distinctions within the definition set out in Article 1, paragraph 1.

The undersigned cannot admit the quoted affirmations, because he believes that the Commission had the duty to examine whether the measures object of the present inquiry were taken or not to protect fundamental rights of the human being. However, such investigation was not made and, consequently, it is not possible for the Commission to decide whether the conduct of the Federal Republic of Germany has been or has not been in conformity with Convention No. 111, because no contradiction could be affirmed if the measures were addressed to protect fundamental rights of the human being, as expressed in the basic democratic order consecrated by the Constitution of the Federal Republic of Germany. Therefore, the undersigned cannot and does not agree with the findings, conclusions and recommendations of the majority of the Commission.

Caracas, 5 December 1986 (Signed) Gonzalo Parra-Aranguren.

The Chairman and Professor Schindler, after having been informed of the preceding statement by Professor Parra-Aranguren, decided to add the following observations:

- 1.** The dissenting opinion by Professor Parra-Aranguren limits itself to a general affirmation of jus cogens and a reservation as to the findings, conclusions and recommendations of the majority of the Commission, but does not examine the decisive legal questions which are relevant in this connection.
- 2.** The existence of jus cogens in public international law is beyond doubt. Likewise, it is generally accepted that rules recognising fundamental rights of the human being form part of jus cogens. The International Court of Justice implicitly confirmed this by referring to "certain general and well-recognised principles, namely: elementary considerations of humanity". (Endnote 249) It can furthermore be taken for granted that the concept of "militant democracy" developed in the Federal Republic of Germany after the Second World War as well as the duty of faithfulness to the free democratic basic order incumbent on all public servants in the Federal Republic are designed to protect, among other values, fundamental rights of the human being, which form part of the free democratic basic order. There is no need to make any further investigations on these questions.
- 3.** However, the fact that governmental measures are designed to protect human rights does not imply that they are necessarily lawful in every respect. A measure which is designed to protect human rights or rights of a certain group of persons may violate other human right or rights of other groups. On the other hand, the fact that a person advocates an order which may conflict with human rights does not exempt a State from its duty to apply international Conventions to that person. Jus cogens has only the consequence that all norms of treaties which are in conflict with it become void, but it has not the consequence that a treaty which is in harmony with jus cogens - as Convention No. 111 - is no more to be applied to persons who advocate an order which might conflict with human rights. Professor Parra-Aranguren attributes to jus cogens a meaning which it does not have either according to the Vienna Convention on the Law of Treaties or according to the generally accepted doctrine of jus cogens. It would be contrary to the very idea of human rights and would amount to a denial of human rights if persons who advocate ideas that may be in conflict with human rights would lose all rights deriving from international human rights Conventions. Such a concept not only has no basis in the law of human rights and the doctrine of jus cogens but would also gravely undermine the principle "pacta sunt servanda". The forfeiture of basic rights takes place only if it is provided for in a

Convention.

4. It is important to note in this connection that Article 5, paragraph 1, of the International Covenant on Civil and Political Rights, as well as the corresponding provisions of Article 17 of the European Convention on Human Rights and of Article 18 of the Basic Law of the Federal Republic of Germany, which provide for the forfeiture of human rights, limit this forfeiture to certain specific rights. Never does a person who abuses rights lose all rights deriving from human rights Conventions. (Endnote 250) In the case of Article 18 of the Basic Law of the Federal Republic of Germany the rights for which the forfeiture can be pronounced are limitatively enumerated.

5. As to Convention No. 111, which does not contain any provision on the forfeiture of rights, it cannot be assumed that such an exception implicitly exists. Nor, as has been pointed out, can such an exception be derived from the rules of *jus cogens*.

6. The Report of the Commission rightly states that no exceptions are admissible under Convention No. 111 other than those provided for in the Convention itself. These exceptions sufficiently take into account the security needs of States. Persons who advocate an order which is in contradiction with the free democratic basic order and human rights may be excluded from all jobs for which an unequivocal behaviour with regard to the free democratic basic order and human rights must be regarded as an inherent job requirement, as explained in Chapter 10 of the report.

Dated 3 February 1987 (Signed) Voitto Saario

Dietrich Schindler

The members of the Commission wish to express their appreciation to Mr. Francis Blanchard, Director-General of the International Labour Office, and to his staff for the assistance provided to them in the course of the inquiry. They wish to record their gratitude to Mr. Thiécouta Sidibé, Director of the International Labour Standards Department, for his valued support and advice. They express particular thanks to Mr. Klaus Samson, Mrs. Jacqueline Ancel-Lenners and Mr. Edward Sussex for their tireless efforts to provide the Commission with the requisite secretariat support. They also thank Mr. Kurt Händler, Director of the ILO Office in Bonn, for the help which he and his staff provided in enabling the visit to the Federal Republic to be carried out smoothly and effectively.

V.S. D. Sch. G.P.A.

APPENDIX I

Text of the substantive provisions of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

Article 1

1. For the purpose of this Convention the term "discrimination" includes -

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

3. For the purpose of this Convention the terms "employment" and "occupation" include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Article 2

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Article 3

Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice-

- (a) to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy;
- (b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;
- (c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
- (d) to pursue the policy in respect of employment under the direct control of a national authority;
- (e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;
- (f) to indicate in its annual report on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.

Article 4

Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice.

Article 5

1. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.

2. Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.

APPENDIX II

Provisions of the ILO Constitution relating to Commissions of Inquiry

Article 26

1. Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles.

2. The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Inquiry, as hereinafter

provided for, communicate with the Government in question in the manner described in Article 24.

3. If the Governing Body does not think it necessary to communicate the complaint to the government in question, or if, when it has made such communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry to consider the complaint and to report thereon.

4. The Governing Body may adopt the same procedure either of its own motion or on receipt of a complaint from a delegate to the Conference.

5. When any matter arising out of article 25 or 26 is being considered by the Governing Body, the government in question shall, if not already represented thereon, be entitled to send a representative to take part in the proceedings of the Governing Body while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the government in question.

Article 27

The Members agree that, in the event of the reference of a complaint to a Commission of Inquiry under article 26, they will each, whether directly concerned in the complaint or not, place at the disposal of the Commission all the information in their possession which bears upon the subject-matter of the complaint.

Article 28

When the Commission of Inquiry has fully considered the complaint, it shall prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken.

Article 29

1. The Director-General of the International Labour Office shall communicate the report of the Commission of Inquiry to the Governing Body and to each of the governments concerned in the complaint, and shall cause it to be published.

2. Each of these governments shall within three months inform the Director-General of the International Labour Office whether or not it accepts the recommendations contained in the report of the Commission; and if not, whether it proposes to refer the complaint to the International Court of Justice.

...

Article 31

The decision of the International Court of Justice in regard to a complaint or matter which has been referred to it in pursuance of article 29 shall be final.

Article 32

The International Court of Justice may affirm, vary or reverse any of the findings or recommendations of the Commission of Inquiry, if any.

Article 33

In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.

Article 34

The defaulting government may at any time inform the Governing Body that it has taken the steps necessary to comply with the recommendations of the Commission of Inquiry or with those in the decision of the International Court of Justice, as the case may be, and may request it to constitute a Commission of Inquiry to verify its contention. In this case the provisions of articles 27, 28, 29, 31 and 32 shall apply, and if the report of the Commission of Inquiry or the decision of the International Court of Justice is in favour of the defaulting government, the Governing Body shall forthwith recommend the discontinuance of any action taken in pursuance of article 33.

Endnote 1

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.

Endnote 2

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

Endnote 3

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.

Endnote 4

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."

Endnote 5

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.

Endnote 6

See paragraph 50 below.

Endnote 7

The record of this debate is contained in the record of the proceedings of the Lower House of the Federal Parliament (Bundestag), tenth electoral period, 194th sitting, 30 January 1986, pp. 14563-14571.

Endnote 8

A record of the hearings has been placed in the ILO Library. Page references to that record in the present report are to the German version.

Endnote 9

ILO: International Labour Conference (ILC), 40th Session, 1957, Report VII (1), pp. 1-4.

Endnote 10

ibid., p. 24.

Endnote 11

ibid., p. 30.

Endnote 12

ILO: International Labour Conference (ILC), 47th Session, 1963, Report of the Committee of Experts on the Application of Conventions and Recommendations (RCE), Part 3, Discrimination in employment and occupation, para. 26.

Endnote 13

ILO: ILC, 68th Session, 1982, RCE Report III (Part 4A), p. 192; *ibid.*, 69th Session, 1983, pp. 212 and 225 (observations concerning Chile, Czechoslovakia and Turkey). See also the Report of the Committee set up to consider the representation presented by the ICFTU concerning the observance of the Convention by Czechoslovakia, ILO: Official Bulletin, Vol. LXI, 1978, Series A, No. 3, Supplement, paras. 17 to 21.

Endnote 14

ILO: Discrimination in the field of employment and occupation, ILC, 40th Session, 1957, Report VII(2), pp. 100 and 116.

Endnote 15

ILO: Record of Proceedings, ILC, 40th Session, 1957, p. 743 and ILO: Discrimination in the field of employment and occupation, ILC, 42nd Session, 1958, Report IV(1), pp. 8 and 9.

Endnote 16

ibid., Report IV(2), p. 5.

Endnote 17

ibid., Report IV(2), pp. 6 and 8.

Endnote 18

ibid., p. 9.

Endnote 19

ILO: Record of Proceedings, ILC, 42nd Session, 1958, p. 711.

Endnote 20

ILO: Discrimination in the field of employment and occupation, ILC, 40th Session, 1957, Report VII(2), pp. 22 and 23.

Endnote 21

ILO: ILC, 47th Session, 1963, RCE, Part 3, para. 42.

Endnote 22

14 *ibid.*, para. 91. See also ILC, 71st Session, 1985, Report III (Part 4A), p. 286 (observation concerning Czechoslovakia).

Endnote 23

15 ILO: Discrimination in the field of employment and occupation, ILC, 42nd Session, 1958, Report IV(1), Appendix.

Endnote 24

ILO: ILC, 47th Session, 1963, RCE, Part 3, paras. 32 and 33.

Endnote 25

ibid., para. 91.

Endnote 26

ibid.

Endnote 27

ibid., para. 94.

Endnote 28

ILO: Record of Proceedings, ILC, 40th Session, 1957, p. 744 and ILC, 42nd Session, 1958, pp. 425 and 712.

Endnote 29

ILO: ILC, 47th Session, RCE, Part 3, para. 47.

Endnote 30

ILO: ILC, 56th Session, RCE, Report III (Part 4B), para. 38.

Endnote 31

See note 5.

Endnote 32

ILO: ILC, 56th Session, RCE, Report III (Part 4B), para. 38.

Endnote 33

GB. 229/5/11 (Feb.-Mar. 1985), para. 46.

Endnote 34

Report of the Committee of Experts on the Application of Conventions and Recommendations (hereafter "RCE"), Report III (4A), International Labour Conference, 62nd Session, 1976, p. 175 and direct request.

Endnote 35

ILO: RCE, *ibid.*, 63rd Session, 1977, p. 228.

Endnote 36

ILO: RCE, *ibid.*, 64th Session, 1978, p. 196.

Endnote 37

Official Bulletin (Geneva, ILO), 1980, Series A, Vol. LXIII, No. 1, pp. 45-46.

Endnote 38

ILO: RCE, International Labour Conference, 66th Session, 1980, p. 171; 67th Session, 1981, pp. 174-175; 68th Session, 1982, pp. 199-200.

Endnote 39

ILO: Record of Proceedings, ILC, 68th Session, 1982, pp. 31/60-61.

Endnote 40

ILO: RCE, ILC, 69th Session, 1983, pp. 216-219.

Endnote 41

ILO: Record of Proceedings, ILC, 1983, pp. 31/60-61.

Endnote 42

ILO: RCE, ILC, 71st Session, 1985, pp. 288-289.

Endnote 43

Total economically active population in 1984 (rounded to the nearest thousand): 25,173,000. Source: Federal Bureau of Statistics.

Endnote 44

BVerfGE (Decisions of the Federal Constitutional Court), judgement of 23 October 1952, 1 BvB 1/51. NJW 1952, p. 1407.

Endnote 45

BVerfGE, judgement of 17 August 1956, 1 BvB 2/51, NJW 1956, p. 1393.

Endnote 46

BVerfGE, judgement of 17 August 1956, principles 5, 6 and 8.

Endnote 47

BVerfGE, judgement of 21 March 1961, 2 BvR 27/60, NJW 1961, p. 723.

Endnote 48

BVerfGE, decision of 22 May 1975, 39 (357-361).

Endnote 49

Federal Civil Service Act, entered into force on 1 Sep. 1953, published in the Bundesgesetzblatt of 6 Mar. 1985 in a new version valid with effect from 1 Mar. 1985.

Endnote 50

Civil Service (General Principles) Act, entered into force on 1 Sep. 1957, published in the Bundesgesetzblatt of 6 Mar. 1985 in a new version valid with effect from 1 March. 1985.

Endnote 51

See for example Civil Service Act: Bavaria (17 Nov. 1978), Lower Saxony (28 Sep. 1978), North Rhine-Westphalia (1 May 1981).

Endnote 52

See in particular section 2(2), section 3 and section 4 of the Civil Service (General Principles) Act concerning officials of the Länder. Under section 2(3), the exercise of sovereign powers as a permanent function should as a rule be entrusted to officials.

Endnote 53

The retirement pension scheme is governed by the Act on Provision for Officials and Judges in the Federation and the Länder (Beamtenversorgungsgesetz, BeamtVG) of 24 Aug. 1976.

Endnote 54

Federal Disciplinary Regulations (Bundesdisziplinarordnung) of 20 July 1967 and Disciplinary Regulations of the Länder (see also para. 167).

Endnote 55

"La gestion du personnel publique en République fédérale d'Allemagne", Hans Joachim von Oertzen, Ministerialrat, Bonn, in *Revue internationale des sciences administratives*, 2/1983, pp. 215-222.

Endnote 56

Collective Agreement of Salaried Employees of the Federation (Bundesangestelltentarifvertrag - BAT) of 1 Apr. 1961 in the version of 12 Dec. 1984, clauses 1, 2 and 3.

Endnote 57

Collective Agreement of Wage Earners in the Service of the Federation (Manteltarifvertrag Bund - MTB).

Endnote 58

Collective Agreement of Wage Earners in the service of the Länder (Manteltarifvertrag Länder - MTL).

Endnote 59

Reinhard Mussnug: "Der Zugang zum öffentlichen Dienst europäischer Staaten", in *Verfassungstreue im öffentlichen Dienst europäischer Staaten*, Duncker and Humblott: "Schriften zum öffentlichen Recht", Vol. 379, pp. 417 and 418.

Endnote 60

von Oertzen, *op. cit.*, p. 215.

Endnote 61

Federal Employment Institution, Employment and Professional Market Research Institute, Bei AB 88, p. 428.

Endnote 62

See R. Mussgnug, *op. cit.*, pp. 424-428.

Endnote 63

E.W. Böckenförde: "Rechtsstaatliche politische Selbstverteidigung als Problem" in *Extremisten und öffentlicher Dienst, Nomos*, p. 23. See also: Council of Europe, European Court of Human Rights, Cour (85) 33, Memorial of the Government of the Federal Republic of Germany (Kosiek case), paras. 25 and 29.

Endnote 64

R. Mussgnug, *op. cit.*, p. 430.

Endnote 65

idem, pp. 430-431.

Endnote 66

Civil Service (General Principles) Act, sections 21-32.

Endnote 67

Section 31(1), clause 1, and section 31(4).

Endnote 68

Section 32(2).

Endnote 69

Act of 15 March 1974 on the representation of federal personnel, section 78(1). This Act also contains provisions applicable to the Länder. See also von Oertzen, *op. cit.*, p. 221.

Endnote 70

Protection against Dismissal Act, 25 Aug. 1969, ILO Legislative Series 1969-Ger. F.R.3.

Endnote 71

Civil Service (General Principles) Act, section 40(1): "An official shall take a service oath. The service oath shall contain a commitment to the Constitution."

Endnote 72

Section 77(1), second sentence, and section 45(1), second sentence, respectively.

Endnote 73

Section 77(2) and section 45(2) respectively.

Endnote 74

BVerfGE, 39, 339. Decision known as the "Radicals Decision" (Radikalenbeschluss).

Endnote 75

Böckenförde, *op. cit.*, pp. 2-39.

Endnote 76

Gerhard Anschütz, "Die Verfassung des Deutschen Reichs", 14th edition, 1933, pp. 602-607.

Endnote 77

Böckenförde, *op. cit.*, p. 19, note 15.

Endnote 78

idem, pp. 19 and 20.

Endnote 79

idem, p. 21.

Endnote 80

Andreas Sattler: "Die rechtliche Bedeutung der Entscheidung für die streitbare Demokratie", *Nomos*, 1982.

Endnote 81

idem.

Endnote 82

Böckenförde, *op. cit.*, pp. 21-23.

Endnote 83

idem, p. 23: "Guarantee clause and clause on support for the free democratic basic order".

Endnote 84

See paras. 224 et seq. below.

Endnote 85

Presse- und Informationsamt der Bundesregierung: Bulletin (Bulletin of the Federal Government Press and Information Office), No. 6, p. 45, 19 Jan. 1979. The full text, including the statement of grounds, is reproduced as an annex.

Endnote 86

Similar amendment to section 45 of the Civil Service (General Principles) Act.

Endnote 87

BVerfGE 39, 339.

Endnote 88

BVerwG, judgement of 29 October 1981. NJW 1982, 779.

Endnote 89

Administrative Court of Hanover, decision of 21 Dec. 1983.

Endnote 90

See para. 228.

Endnote 91

Judgement of 29 October 1981, op. cit.

Endnote 92

BVerwG, judgement of 10 May 1984. DVBL 1984, 955.

Endnote 93

NDH A(1) 4/84.

Endnote 94

3K 1/85.

Endnote 95

BDiG I VL 25/83.

Endnote 96

BAG, judgement of 31 March 1976. The employing authority must state the facts and, if the applicant challenges them, prove the assertions on which it bases its doubts as to his faithfulness to the Constitution. BAG, judgement of 29 July 1982.

Endnote 97

BAG, judgement of 9 December 1981.

Endnote 98

BAG, judgement of 5 August 1982.

Endnote 99

BAG, judgement of 6 June 1984, NJW 1985, p. 507.

Endnote 100

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

ILO Official Bulletin, Vol. LXIII, 1980, Series A, No. 1, pp. 40-53.

Endnote 101

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 4, paras. 105 and 106.

Endnote 102

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Wolfgang Schlappa: Zur Vereinbarkeit der Entscheidung des Bundesverwaltungsgerichts vom 29.10.1981 - sog. Peter-Entscheidung - mit der europäischen Menschenrechtskonvention (Bremen, Zentrum für europäische Rechtspolitik (ZERP) an der Universität Bremen, Jan. 1983).

Endnote 103

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Martin Kutscha: Die aktuelle Rechtsprechung in Berufsverboteverfahren, Materialien und Dokumente zu den Berufsverboten in der BRD, Heft 32 (Hamburg, Arbeitsausschuss der Initiative "Weg mit den Berufsverboten", June 1985).

Endnote 104

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Deutscher Bundestag: Beratung der Grossen Anfrage der Fraktion DIE GRÜNEN: Berufsverbote in der Bundesrepublik Deutschland, 10. Wahlperiode, 194. Sitzung, Bonn, 30 Jan. 1986.

Endnote 105

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

ILO: Record of Proceedings, International Labour Conference, Geneva: 67th Session, 1981, 31/55; 68th Session, 1982, 31/60-61; 69th Session, 1983, 31/60-61.

Endnote 106

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Deutsche Postgewerkschaft, Bezirksverwaltung Hessen: Einschränkung gegen gewerkschaftliche Rechte bei der Deutschen Bundespost in Hessen (Frankfurt, 1985).

Endnote 107

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Information provided by the Koordinierungsausschuss der Bürgerinitiativen gegen Berufsverbote in Baden-Württemberg.

Endnote 108

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Stellungnahme des Arbeitsausschusses der Initiative "Weg mit den Berufsverboten" zur Antwort der Bundesregierung (BT-Drucksache 10/36 56) auf die Grosse Anfrage der Fraktion "Die Grünen" betr. Berufsverbote in der Bundesrepublik Deutschland (BT-Drucksache 10/22 07), Hamburg, Nov. 1985.

Endnote 109

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

For example, Deutsche Postgewerkschaft, Bezirksverwaltung Hessen: Berufsverbote bei der Bundespost, Dokumentation; Deutsche Postgewerkschaft, Ortsverwaltung Fernmeldeamt Giessen: Kein Berufsverbot für Axel Brück und Egon Momberger, Dokumentation (Giessen, 1983); Deutsche Postgewerkschaft, Ortsverwaltung Frankfurt: Kein Berufsverbot für den Briefträger Wolfgang Repp, Dokumentation (Frankfurt, 1985); GEW im DGB, Landesverband Rheinland-Pfalz: Dokumentation zur Einschränkung von Meinungsfreiheit in Rheinland-Pfalz - Berufsverbote für Lehrer (Mainz, 1985); Koordinierungsausschuss der niedersächsischen Initiativen gegen Berufsverbote: Mit dem Berufsverbot gegen das Wahlrecht in Niedersachsen (Oldenburg); Hamburger Landeskomitee der Initiative "Weg mit den Berufsverboten": Kein Berufsverbot für Uwe Scheer! (Hamburg, 1986); Initiative "Weg mit den Berufsverboten", Arbeitsausschuss, Hamburg: Rundbrief Nr. 66/85 (Hamburg, March 1985).

Endnote 110

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

In judgements given in August 1986, the European Court of Human Rights concluded that the issue at the heart of these cases was access to the civil service, a right not secured in the European Convention on Human Rights or in any of its Protocols. The Court therefore ruled that there had been no interference with the exercise of a right protected by the Convention.

Endnote 111

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Cases of Rüdiger Quaer and Martin Zeiss respectively.

Endnote 112

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Cases of four legal trainees in Bavaria.

Endnote 113

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Case of Charlotte Niess-Mache.

Endnote 114

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Cases of Gerhard Bitterwolf and Ulrich Foltz.

Endnote 115

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Cases of Hans Heinrich Häberlein and Manfred Lehner.

Endnote 116

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Cases of Ulrich Eigenfeld and Rolf Kosiek.

Endnote 117

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Claussen, X/15.

Endnote 118

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Claussen, X/13.

Endnote 119

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Ziegler, XIII/9.

Endnote 120

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Metz, VIII/11.

Endnote 121

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Frisch, IX/15-16.

Endnote 122

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Ministerium des Innern und für Sport, Rheinland-Pfalz: Verfassungsschutzbericht, 1985, p. 129.

Endnote 123

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Freundlieb, XI/14.

Endnote 124

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Däubler, V/26-28.

Endnote 125

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Krause, XV/30.

Endnote 126

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Däubler, V/27-28; Ortmann, VII/22.

Endnote 127

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Bitterwolf, III/12; Däubler, V/27.

Endnote 128

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Bastian, III/28.

Endnote 129

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Bastian, III/31.

Endnote 130

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Bastian, IV/9.

Endnote 131

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See also Chapter 5, paras. 231 and 232.

Endnote 132

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Bastian, III/26-27.

Endnote 133

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Bastian, IV/7.

Endnote 134

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Meister, II/9.

Endnote 135

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Meister, II/12, 21.

Endnote 136

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings

(German version).

Meister, II/17.

Endnote 137

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Meister, II/12.

Endnote 138

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Meister, II/5.

Endnote 139

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Meister, II/20.

Endnote 140

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Däubler, V/15-16.

Endnote 141

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Ziegler, XIII/13 and information given during discussions in Stuttgart in August 1986.

Endnote 142

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Ziegler, XIII/6 and 11-12.

Endnote 143

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Bitterwolf, III/2.

Endnote 144

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Bitterwolf, III/8.

Endnote 145

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Bitterwolf, III/12.

Endnote 146

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Bitterwolf, III/9.

Endnote 147

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Niess-Mache, IV/15.

Endnote 148

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Metz, VIII/23-24.

Endnote 149

Krause, XV/18.

Endnote 150

Krause, XV/19.

Endnote 151

Krause, XV/25-26.

Endnote 152

Halberstadt, XIII/24-27.

Endnote 153

Halberstadt, XIII/24, XIV/2.

Endnote 154

Ratz, VI/16-18.

Endnote 155

Ortmann, VII/12-15.

Endnote 156

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 7, para. 397, and Metz, VIII/7-8; Ziegler, XIII/10-11; Claussen, X/3; Freundlieb, XI/1-2.

Endnote 157

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Claussen, X/3.

Endnote 158

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Freundlieb, XI/2.

Endnote 159

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Ratz, VII/9.

Endnote 160

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Ziegler, XIII/10.

Endnote 161

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Frisch, IX/4-5.

Endnote 162

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Frisch, IX/17.

Endnote 163

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 6, para. 369.

Endnote 164

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Ortmann, VII/23-24.

Endnote 165

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Däubler, V/29, VI/4.

Endnote 166

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Ortmann, VII/24-25.

Endnote 167

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Bitterwolf, III/22-23, Däubler, V/29.

Endnote 168

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Paech, I/25-26; Bitterwolf, III/22-23; Däubler, VI/4.

Endnote 169

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Halberstadt, XIV/4.

Endnote 170

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Metz, VIII/8.

Endnote 171

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 2, paras. 34 and 56.

Endnote 172

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Meister, II/13-14; Bitterwolf, III/19-20; Däubler, VI/6-7; Ratz, VII/6-7; Paech, XII/11.

Endnote 173

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Cases of Julia Glasenapp, Rolf Kosiek, Rüdiger Quaer and Ulrich Eigenfeld - see Chapter 6.

Endnote 174

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Jean Zarras: *Le contrôle de l'application des conventions internationales du travail*, Sirey, Paris, 1937, pp. 220-221; Nicolas Valticos: *Droit international du travail*, 2nd edition, Dalloz, Paris, 1983, p. 607.

Endnote 175

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 6.

Endnote 176

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See ILO Official Bulletin, Vol. LXI, 1978, Series A, No. 3, Supplement, Appendix III.

Endnote 177

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

ibid., Appendices V and VI.

Endnote 178

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

ILO Official Bulletin, Vol. LXVI, 1983, Series B, No. 1, p. 177, para. 28.

Endnote 179

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

ILO, Official Bulletin, Vol. LXV, No. 2, Apr. 1962, Supplement II.

Endnote 180

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

ILO, Official Bulletin, Vol. LXVI, 1983, Series B, Special Supplement.

Endnote 181

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See the report concerning Portugal, *op. cit.*, paras. 754-760, and the report concerning the Dominican Republic and Haiti, *op. cit.*, paras. 508-511 and 544-545.

Endnote 182

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

ILO, Official Bulletin, Vol. LX, 1977, Series B, No. 3, p. 15, para. 78.

Endnote 183

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

ILO, Official Bulletin, Vol. LIV, 1971, No. 4, p. 8, para. 47.

Endnote 184

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See A.A. Cançado Trindade: *The application of the rule of exhaustion of local remedies in international law*, Cambridge University Press, 1983, Chapter 4.

Endnote 185

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

ibid., p. 181.

Endnote 186

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

BVerfGE 39, pp. 359-360.

Endnote 187

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 6, paras. 250-252.

Endnote 188

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Bitterwolf had been convicted of insult to the Bavarian Minister President; however, according to the Bavarian Administrative Court, that did not suffice to impair his suitability for appointment; see Chapter 6, para. 347.

Endnote 189

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 5, paras. 214 to 220.

Endnote 190

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 4, para. 102.

Endnote 191

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Paech, I/25, XI/24-25; Däubler, V/21.

Endnote 192

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 6 and Ortmann, VII/13-14, 21; Metz, VIII/11; Frisch, IX/14-16; Ziegler, XIII/10-12.

Endnote 193

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Bitterwolf, III/3; Ratz, VI/16; see also Chapter 6, paras. 351, 357, 360 and 362.

Endnote 194

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See, for example, the decision of the Federal Constitutional Court of 22 May 1975, BVerfGE 39, pp. 352-354; also Chapter 6, paras. 349 and 359.

Endnote 195

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 6, paras. 265 to 268.

Endnote 196

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

For example, Baden-Württemberg: Engel; Rhineland-Palatinate: Barthel, Burkart; Schleswig-Holstein: Bürger, Könings.

Endnote 197

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

For example, Baden-Württemberg: Lipps; Rhineland-Palatinate: Lachmann.

Endnote 198

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

For example, Lower Saxony: Eckartsberg, Klüver, Müller, Schön, Wilhelmer; Rhineland-Palatinate: Fronemann, Jung.

Endnote 199

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

For example, Baden-Württemberg: Groeneveld; Lower Saxony: Eckartsberg, Flessner, Klüver, Lange, Lepa, Marks, Pannemann, Paulus, Schultze-Kranert.

Endnote 200

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

For example, Lower Saxony: Lammers, Müller, M. Schachtschneider, Schön.

Endnote 201

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Claussen, X/5-6; see also Freundlieb, XI/13.

Endnote 202

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See case descriptions in Chapter 6.

Endnote 203

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

For example, in Hamburg (Scheer), Hessen (Bastian, Brück, Elsinger, Mende, Momberger, Repp) and North Rhine-Westphalia (Hütter); see also Chapter 6, para. 284.

Endnote 204

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See, for example, the decisions of the Lower Saxony Disciplinary Court in the Eckartsberg case, concluding that objectively he had violated the duty of faithfulness (Chapter 5, para. 228, Chapter 6, para. 369), of the Baden-Württemberg Administrative Court in the Fronemann case (Chapter 6, para. 334; that decision was reversed by the Federal Administrative Court merely on a point of procedure, *ibid.*, para. 335) and of the court of first instance in the Jung case in Rhineland-Palatinate (Chapter 5, para. 230, Chapter 6, para. 382).

Endnote 205

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 7, para. 395, section I.

Endnote 206

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 3, para. 85.

Endnote 207

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 3, para. 86.

Endnote 208

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

ILO Official Bulletin, Vol. 17, 1932, pp. 117-123.

Endnote 209

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 7, para. 395, section III.

Endnote 210

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Such difficulties were noted, for example, by the Human Rights Committee when it considered the second periodic report of the Federal Republic of Germany on the implementation of the Covenant in April 1986 - see UN documents CCPR/C/SR.664 and CCPR/C/SR.667. See also, in regard to corresponding provisions in the European Convention on Human Rights, Frowein/Peukert: Europäische Menschenrechtskonvention, Engel, Kehl, 1985, pp. 338-340.

Endnote 211

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

According to Article 18 of the Basic Law of the Federal Republic of Germany, a person may, by decision of the Federal Constitutional Court, be deprived of his basic rights, to the extent determined by the Court, if he misuses specified freedoms (freedom of expression, of teaching, of assembly, of association, etc.) to fight against the free democratic basic order. In none of the cases brought to the attention of the Commission have any measures been taken with a view to invoking this article.

Endnote 212

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 7, para. 395, section IV.

Endnote 213

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 3, para. 75.

Endnote 214

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

ibid.

Endnote 215

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 7, para. 396, point 6.

Endnote 216

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See, more particularly, the Convention against Discrimination in Education, Article 1, the International Convention on Elimination of All Forms of Racial Discrimination, Article 1, and the Convention on the Elimination of All Forms of Discrimination against Women, Article 1. While both the International Covenants on Human Rights contain general non-discrimination clauses, neither of them contains a definition of "discrimination". The Covenant on Civil and Political Rights, for example, provides in Article 2 that the rights recognised in the Covenant shall be respected and ensured "without distinction of any kind, such as ... political or other opinion ..."

Endnote 217

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 7, para. 396, point 7.

Endnote 218

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Report III (Part IV), International Labour Conference, 47th Session, 1963, Part Three, p. 226, para. 108.

Endnote 219

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

ibid., p. 198, para. 29.

Endnote 220

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 7, para. 398.

Endnote 221

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 7, para. 395, section V.

Endnote 222

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

According to Article 14 of Convention No. 111, the English and French texts are the authoritative versions.

Endnote 223

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See, for example, the judgement of the European Court of Human Rights of 26 April 1979 in *The Sunday Times* case, Series A, No. 30, paras. 59 and 62, and the Advisory Opinion of the Inter-American Court of Human Rights of 13 November 1985 regarding compulsory membership in an association prescribed by law for the practice of journalism, paras. 46 and 79. For a general review of the practice under relevant international instruments, see *Human Rights Quarterly*, Vol. 7, No. 1, Feb. 1985, pp. 52 to 56.

Endnote 224

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See paras. 77 to 80.

Endnote 225

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 3, para. 82.

Endnote 226

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Report III (Part 4A), International Labour Conference, 63rd Session, 1977, p. 11, para. 31. The same point has been emphasised by the Court of Justice of the European Communities in considering cases relating to freedom of movement of workers under Article 48 of the Treaty of Rome - see Judgement No. 149/79 of 17 December 1980 (*Belgian Railways Case*) and Judgement No. 66/85 of 3 July 1986 (*Lawrie-Blum v. Land Baden-Württemberg*).

Endnote 227

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See para. 459 above.

Endnote 228

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings

(German version).

See paras. 489 to 497.

Endnote 229

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Frisch, IX/25.

Endnote 230

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

For example, cases of Herbert Bastian (Chapter 6, paras. 275 to 279), Hans Meister (Chapter 6, para. 298), Hans Peter (Chapter 6, paras. 310 and 311), Helga Lange, Uwe Scheer (Chapter 6, para. 327).

Endnote 231

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

For example, cases of Klaus Lipps (Chapter 6, paras. 339 and 340), Rüdiger Quaer.

Endnote 232

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Meister, II/16; Däubler, V/25; Claussen, X/24.

Endnote 233

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 7, para. 395, section V, and para. 397, section IV.

Endnote 234

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Claussen, X/25.

Endnote 235

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See the study submitted to the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1982 by Mrs. Nicole Questiaux, E/CN.4/Sub.2/1982/15, para. 41, and Human Rights Quarterly, Vol. 7, No. 1, Feb. 1985, pp.

91-98 and 105-112. For corresponding statements in regard to ILO Conventions relating to freedom of association, see the reports of the Commissions of Inquiry which examined the observance of Conventions Nos. 87 and 98 by Greece and Poland, ILO, Official Bulletin, Vol. LIV, 1971, No. 2, Special Supplement, para. 110; *ibid.*, Vol. LXVII, 1984, Series B, Special Supplement, para. 479.

Endnote 236

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 7, para. 395, section V.

Endnote 237

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Freundlieb, XI/6-7; Doehring, XIV/21; Krause, XV/19.

Endnote 238

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See paras. 532 to 535.

Endnote 239

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

For example, Judge Simon, judge of the Federal Constitutional Court, in a judgement of 8 March 1983, NJW 1983, pp. 1540-1541; Mrs. Eike Weissenfels, judge of the Labour Court, Nuremberg, in a legal opinion communicated to the Commission.

Endnote 240

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Deutscher Bundestag, 10. Wahlperiode, 194. Sitzung, 30 January 1986, p. 14569.

Endnote 241

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Däubler, V/7-10; Ortmann, VIII/14; Paech, XI/19; Halberstadt, XIV/5-6; Krause, XV/26-27.

Endnote 242

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

E.W. Böckenförde, C. Tomuschat and D.C. Umbach (eds.): *Extremisten und öffentlicher Dienst*, Nomos, Baden-Baden, 1981, p.

656.

Endnote 243

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 7, para. 395, section V.

Endnote 244

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Däubler, V/19; Ratz, VI/20; Claussen, X/9-10, 18.

Endnote 245

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See Chapter 7, para. 395, section VI.

Endnote 246

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Claussen, X/16; Freundlieb, XI/11.

Endnote 247

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

See, in particular, the judgement of the Federal Administrative Court of 29 October 1981 in the case concerning Hans Peter, and the judgement of the Administrative Court, Hannover, of 21 December 1983 in the case concerning Karl-Otto Eckartsberg (reversed on other grounds, not affecting this finding).

Endnote 248

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Reference may also be made to the view taken by the Federal Disciplinary Court in a series of recent decisions; see Chapter 5, para. 232.

Endnote 249

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

Corfu Channel Case (Merits), ICJ Reports 1949, p. 22; Case concerning military and paramilitary activities in and against Nicaragua, ICJ Reports 1986, pp. 112 and 114, paras. 215 and 218.

Endnote 250

(Reference to statements made during the hearing of witnesses indicates the sitting and page of the Record of Hearings (German version).

cf., e.g., as to the International Covenant: Thomas Buergenthal, State obligations and permissible derogations, in: Louis Henkin, (ed.), *the International Bill of Rights*, Columbia University Press, New York 1981, p. 89; as to the European Convention: Lawless case, judgement of the European Court of Human Rights of 1 July 1961, *Publications of the European Court of Human Rights, Series A, 1960-61*, p. 45, paras. 6 and 7; Frowein/Peukert, *Europäische Menschenrechtskonvention*, Engel, Kehl, 1985, p. 339.