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.[1]

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.[2] 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),[3] 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.[4]

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.[5]

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.[6] 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.[7] 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".[8]

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[9] and the use of coercion and malpractices in the payment of wages in respect of plantation labour in the Dominican Republic.[10] 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.[11]

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.[12]

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.[13] 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.[14] 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.[15]

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.[16]

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.[17] 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,[18] 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.[19] 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.[20] 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.[21]

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.[22] 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.[23] 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.[24]

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.[25] They include suspected membership of the DKP, combined with refusal to answer questions concerning such membership or to distance oneself from that

party;[26] limited participation in party activities;[27] holding office in the party;[28] standing as a candidate for the party at elections;[29] and being a DKP member of a municipal council.[30] 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.[31] 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.[32] 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.[33]

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.[34] 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.[35]

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".[36] 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 ..."[37]

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."[38]

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.[39] 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.[40]

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[41] 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.[42]

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 ..."[43] 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".[44] 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.[45] 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.[46]

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.[47]

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."[48] 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".[49]

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.[50] 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.[51]

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").[52] 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.[53]

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,[54] 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".[55]

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".[56] 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[57] 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,[58] 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.[59]

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.[60] 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.[61] 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.[62] 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.[63]

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.[64]

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,[65] 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.[66] 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.[67]

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.[68] 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.[69] 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.[70]

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.[71] 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".[72] 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.[73]

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.[74] 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-Württemburg 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.[75]

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.[76] 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.[77] 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 adhesion 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.[78]

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.

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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