Les normes internationales du travail: un patrimoine pour l'avenir

Mélanges en l'honneur de Nicolas Valticos

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The "*Berufsverbot*" problem revisited – Views from Geneva and Strasbourg

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I. Introduction

The ILO Constitution provides for two forms of supervision of the observance of ratified ILO Conventions – regular supervision based on examination of periodic reports from Governments, and contentious procedures of representation (to be examined by the Governing Body) and complaints (which may be referred to a Commission of Inquiry). During the first forty years of the ILO's existence, reliance was placed almost exclusively on non-contentious supervision. Its efficacy had been enhanced by the creation in 1927 of the Committee of Experts on the Application of Conventions and Recommendations and of a standing Conference Committee in which problems of observance of ILO Conventions could be discussed directly with governments. Although there were several representations on technical issues, prior to 1961 there had been only one complaint, filed in 1934, concerning hours of work on the railways in India. It had been settled on the basis of an undertaking by the Government to adopt remedial measures.

One may wonder why so little use was made of the complaints procedure during all those years. Governments as well as workers' and employers' organizations appear to have been satisfied with the results yielded by the regular supervision arrangements. They may also have been reluctant to initiate complaints that would be seen as inimical to the country concerned and might harden resistance to influence from the ILO. The complaints filed in 1961 by the Government of Ghana against Portugal and in 1962 by the Government of Portugal against Liberia were the first to lead to the appointment of commissions of inquiry. They were motivated by political considerations and reflected strained international relations. A number of subsequent complaints were similarly submitted

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against a background of political controversy, such as those against Greece, Chile, Poland, the Federal Republic of Germany and Romania. The ILO has always been anxious to ensure that, whatever the motivation underlying the submission of a complaint, the issues would be examined in an impartial and objective manner, in terms of the legal considerations involved.

There are no formal texts regulating the procedures of ILO Commissions of Inquiry. Whenever appointing such a Commission, the Governing Body has authorized it to establish its own procedure. Through their advice to the early commissions, Wilfred Jenks and Nicolas Valticos made a vital contribution to the fashioning of these procedures. The pattern thus established became the model for all subsequent commissions. An established practice was sufficiently flexible to permit adaptation to the particular exigencies of different cases.[1]

Although ILO Commissions of Inquiry have followed certain aspects of judicial procedure (for example, in observing the *audi alteram partem* rule and in the manner in which the hearings of witnesses have been organized), they have considered that their task was not limited to adjudicating on submissions by the parties. They have taken considerable initiatives in gathering information on the issues before them. They have also been concerned to give a full account of their work in their reports, so as to enable readers to judge the basis for their conclusions and recommendations. Although hearings of witnesses have been held in private, after the conclusion of the inquiries the records of the hearings have been placed in the ILO Library.

I was a member of the secretariat of the first two ILO Commissions of Inquiry, regarding forced labour in Portuguese Africa and in Liberia. Two decades later I was responsible for the secretariats of the Commissions that examined complaints concerning the conditions of Haitian workers on the sugar plantations of the Dominican Republic and the exclusion of political radicals from public employment in the Federal Republic of Germany – the so-called "*Berufsverbot*" controversy.[2] In the present essay I intend to review the questions examined by the last of these Commissions. Several cases raising the same issues were brought before the European Court of Human Rights. I propose to compare the Court's conclusions with those reached in the ILO and to consider the effects of the work of the Court and of the ILO.

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[1] Nicolas Valticos reviewed the work of ILO inquiries over a period of 25 years in his article "Les Commissions d'enquête de l'Organisation internationale du Travail", *Revue générale de droit international public*, vol. 91, 1987, pp. 847-879.

[2] The expression "*Berufsverbot*" (occupational ban) was current among critics of official policies and practice. The German authorities maintained that no such bans existed, and that the issue concerned measures to ensure observance by public servants of their duty of faithfulness to the Constitution.

II. The German case – preliminary questions

ILO Commissions of Inquiry have generally had as their primary task the ascertainment of facts, and have had to weigh up conflicting evidence provided by the parties. In the German case – in which a great mass of information on individual cases became available, including court decisions – the facts were not disputed. The debate was essentially one of law, namely, whether legislation and practice, as evidenced by the documents submitted to the Commission, were in harmony with the provisions of the ILO Convention on discrimination in employment and occupation.[3]

The case involved a major Western democracy, and the question was raised why the ILO should devote its attention to the situation there, when there were serious human rights problems in many other countries. It should be noted that, like other international bodies that maintain procedures for examining complaints of violations of human rights standards, the ILO does not control the use made of that possibility to submit complaints. Moreover, as will be shown below, the decision to refer the German case to a Commission of Inquiry flowed from discussions that had taken place under several ILO procedures over a number of years. Nor should one underestimate the significance of the issues examined by the ILO Commission. They involved the balancing of conflicting interests between, on the one hand, freedom of expression and of association within democratic political processes and, on the other, the State's concern to ensure its security and to protect the functioning of public services. The impugned measures were also far-reaching in their personal reach, since they might affect all workers in the public sector.

1. Origin of the dispute

The Constitution (Basic Law) of the Federal Republic of Germany guarantees a number of fundamental rights, including the rights to freedom of expression and of association, the right not to be disadvantaged by reason of one's political opinions, the right to free choice of occupation, and the right of every German to equal access to every public post according to his ability, qualifications and occupational performance. The Constitution also imposes certain limitations. Thus, it prohibits associations directed against the constitutional order.

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[3] In a letter to the Commission prior to its hearing of witnesses, the Government observed that that session should be devoted primarily to questions of law rather than questions of fact. It stated that legal practice, in so far as reflected in judicial decisions, was not contested by the Federal Government – see Report of the Commission, *Official Bulletin*, vol. 70, 1987, Series B, p. 11.

Article 21 of the Constitution provides for the free establishment of political parties and their right to participate in forming the political will of the people. However, parties which, judged by their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany may be declared unconstitutional by the Federal Constitutional Court.

In the 1950's the Federal Constitutional Court declared two parties – the Socialist Reich Party and the Communist Party of Germany (KPD) – to be unconstitutional under the above-mentioned provisions.[4] It ordered their dissolution and prohibited the formation or continuation of substitute organizations.

The late 1960's saw the establishment of the German Communist Party (DKP) and of the right-wing National Democratic Party of Germany (NPD). The authorities decided not to seek the prohibition of these parties by the Federal Constitutional Court, but to combat them politically. Measures were, however, taken to limit access to the public service by persons active in such parties. In 1972 both the federal authorities and regional governments issued guidelines for the verification of faithfulness to the free democratic basic order of public servants and applicants for employment in the public service – the so-called Radicals Decree. The legality of these measures was upheld by the Federal Constitutional Court in 1975. The authorities and the courts formulated a new concept not mentioned in the Constitution, namely, that of organizations which, though lawful, pursued aims hostile to the Constitution. Persons active in such organizations were to be excluded from the public service. Traditionally, public servants played a prominent role in German political life. Measures barring adherents of certain parties from the public service thus significantly weakened those parties.

2. Circumstances leading to the appointment of an ILO Commission of Inquiry

The Federal Republic of Germany ratified the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) in 1961. The Convention defines "discrimination" as including any distinction, exclusion or preference made *inter alia* on the basis of political opinion which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. Ratifying States undertake to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and

[4] The decision banning the Communist Party of Germany was upheld by the European Commission of Human Rights as compatible with the European Convention of Human Rights.

occupation, with a view to eliminating any discrimination in respect thereof. States are required, amongst other measures, to pursue the policy in respect of employment under the direct control of a national authority and also to repeal any statutory provisions and to modify any administrative instructions or practices that are inconsistent with the policy. The Convention provides for two exceptions. According to Article 1, paragraph 2, any distinction, exclusion or preference in respect of a particular job based on its inherent requirements shall not be deemed to be discrimination. Under 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 discrimination, provided that he has the right of appeal to a competent body established in accordance with national practice.

In November 1975 the World Federation of Trade Unions (WFTU) submitted comments to the ILO regarding the rules and practice in the Federal Republic of Germany as regards verification of faithfulness to the basic order of public officials and of applicants for employment in the public service. In January 1976 similar comments were received from the World Federation of Teachers' Unions. These comments were brought to the attention of the Committee of Experts on the Application of Conventions and Recommendations, which asked the Government for clarification.

In January 1978 the World Federation of Teachers' Unions (affiliated to the WFTU) submitted a representation under Article 24 of the ILO Constitution alleging widespread exclusion from public service employment under the provisions for verification of faithfulness to the basic order. This representation was examined by a tripartite committee of the Governing Body. While the matter was under consideration, revised federal principles for the verification of faithfulness to the Constitution were issued in January 1979, which appeared to limit the application of the powers in question. The tripartite committee concluded that their effect would depend on the manner in which they were applied. That question should be examined under the ILO's regular supervision procedures. Information should also be provided on measures taken at the level of the *Länder*. The Governing Body, in November 1979, took note of the committee's report and declared the procedure closed.

In the following years the Committee of Experts reviewed developments, including judicial decisions. In June 1984, the WFTU presented a new representation, alleging that since 1979 there had been several hundred cases of discriminatory measures against public servants and applicants for posts in the public service. This representation too was referred to a tripartite Governing Body committee, composed of a Finnish Government representative, a Swiss Employer member and an Austrian Worker member. The committee presented its report to the Governing Body in February 1985. In the light of the documentation submitted to it, including court decisions, the committee recommended

the Governing Body to conclude that the duty of faithfulness to the basic order, as then applied in the Federal Republic of Germany, went beyond what was authorized by the exception clauses in Article 1, paragraph 2, and Article 4 of Convention No. 111 (in respect of inherent job requirements and activities prejudicial to the security of the State). The committee recommended that the Government be invited to review the position and to adopt measures to ensure the observance of the Convention in these respects.

When the committee's report was examined by the Governing Body in June 1985, the representative of the Government of the Federal Republic of Germany stated that the Government was not able to accept the committee's conclusions. In these circumstances, the Governing Body decided to refer the matter to a Commission of Inquiry, in accordance with Article 26 of the ILO Constitution (a possibility specifically foreseen in the Standing Orders governing the representations procedure).[5]

3. The procedure followed by the Commission of Inquiry

As in earlier cases, the ILO Governing Body authorized the Commission to establish its own procedure. The Commission followed closely the procedures of previous inquiries. Its investigation involved three stages: the gathering of information both from the parties and from other sources, hearings of witnesses in Geneva, and a visit to Germany.

The Commission received voluminous documentation from the German federal Government, from the WFTU, from national trade unions, from other non-governmental organizations and from individuals affected by measures taken under the relevant national texts. This material included detailed documentation on over 70 individual cases, including court judgments frequently at several levels, as well as legal opinions and books comparing the legislation and practice in Germany with those of other European countries. In its report the Commission included a summary of action taken in the cases for which it had received detailed documentation, as well as a more detailed description of 15 of these cases.[6]

At hearings over a period of two weeks in April 1986, the Commission heard evidence from 16 witnesses. Six were heard at the request of the WFTU –

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[5] In November 1985, the Governing Body appointed the members of the Commission: Voitto Saario, former Justice of the Supreme Court of Finland, as Chairman, Dietrich Schindler, Professor of International Law and Constitutional and Administrative Law at the University of Zurich, and Gonzalo Parra-Aranguren, Professor of Private International Law at the Central University of Venezuela.

[6] See Report of the Commission, *op. cit.*, paras. 260-393.

two university professors and four persons who had been directly affected by measures taken in pursuance of the Radicals Decree. Six witnesses were heard at the request of the German Government, including the Federal Disciplinary Prosecutor, senior officials from the Federal Ministry of Posts and Telecommunications and from three *Länder* administrations, and a university professor. Four witnesses appeared on behalf of German trade unions representing postal workers, teachers, salaried employees and public officials.

The Commission visited Germany for ten days in August 1986. In addition to discussions with the federal authorities in Bonn, the Commission or individual members had discussions with the authorities of six *Länder*, several trade union representatives, lawyers who had acted for persons affected by measures under the Radicals Decree, and two university professors.

The great mass of information gathered enabled the Commission to obtain a comprehensive view of the manner in which the relevant legal texts were interpreted and applied in practice. However, the German Government submitted that account should not be taken of individual cases so long as the persons concerned had not exhausted all available domestic remedies, including recourse to the Federal Constitutional Court. The Commission noted that on four recent occasions the Federal Constitutional Court had declined to entertain complaints from persons excluded from the public service on political grounds, because they were considered to have insufficient prospects of success. There was therefore doubt whether recourse to that Court was still a remedy that in practice remained available. The Commission observed, furthermore, that in contrast to other international procedures (such as those under UN and regional human rights instruments) the ILO procedures of representation and complaint were not subject to any condition of prior exhaustion of local remedies. These ILO procedures might be initiated by entities having no direct interest in the matter. They were not based on the traditional notion of action by a State to protect the interests of its citizens, but provided for investigation as a matter of general public interest. They were designed not to pass judgment on individual cases, but to determine whether a given situation was in conformity with a Convention ratified by the country in question. In that context, individual cases were merely items of evidence. The large number of judicial decisions in the German case, including decisions by the highest administrative and labour courts, provided evidence of the effect of legislative texts and of administrative practice, and permitted conclusions to be drawn on whether the public authorities were pursuing the policy and adopting the measures called for by Convention No. 111. In those circumstances, it would not be proper for the Commission to disregard information on specific cases on the ground that one possible avenue of redress had not been sought.[7]

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[7] *Ibid.*, paras. 455-468.

III. The German case – the merits

1. The principal issues examined by the Commission

While the German Government made submissions on a series of other questions,[8] the case turned essentially on the two issues already identified by the tripartite Governing Body committee, namely, whether the measures taken to exclude persons from employment in the public service could be justified under the exceptions provided for in Article 1, paragraph 2 (inherent job requirements) and Article 4 (activities prejudicial to the security of the State) of Convention No. 111. It is proposed to concentrate here on those issues. Before doing so, it appears necessary to note the different legal relationships under which public servants may be employed in Germany, and the consequences of their status on their obligations.

Public servants in Germany may be officials (*Beamte*) with a public law status or salaried employees (*Angestellte*) or wage-earners (*Arbeiter*) governed by labour law and collective agreements. Disputes arising out of the employment relation are considered by different sets of courts. In the case of officials, they are decided by administrative courts, with the Federal Administrative Court as the highest instance. Disputes involving salaried employees and wage-earners are dealt with by the labour courts, with the Federal Labour Court as the highest instance. According to the public service laws, appointment as an official should be limited to functions that involve the exercise of sovereign power. Practice, however, is very different. Appointments as officials are made to a wide range of jobs that do not involve the exercise of sovereign power, not only at sub-ordinate levels of public administration, but also for ordinary work in public services, such as postal services, railways, health and welfare services, schools and universities. Decisions on whether to employ public servants as officials or under a contract of employment are taken not according to the nature of the functions to be exercised, but in the light of personnel policies and budgetary considerations. The cases brought to the attention of the ILO Commission, even when involving officials, concerned almost exclusively workers in run-of-the mill jobs, especially in the postal services and in teaching posts.

Both officials and public servants employed under labour law are bound by the duty of faithfulness to the free democratic basic order. However, the

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[8] These questions concerned the applicability of Convention No. 111 to the employment relations of officials (*Beamte*) (dealt with in paras. 501-505 of the Commission's report), the applicability of the Convention to measures taken to maintain a public service faithful to the Constitution (paras. 506-509), whether the measures under consideration involved discrimination on the basis of political opinion (paras. 510-520), the nature of the obligations assumed under Convention No. 111 (paras. 521-523), and the significance of recent judgments of the European Court of Human Rights (paras. 524-526).

manner in which this duty was interpreted varied. The Federal Constitutional Court had ruled in 1975 that the duty applied to the relationship of every official, without any differentiation according to the nature of his duties. On the other hand, the Federal Labour Court had held that in the case of public servants subject to a labour law relationship the requirements of the duty of faithfulness should be differentiated according to the nature of the duties of the post. In the opinion of that Court, to apply a uniform duty of faithfulness to all public servants, divorced from the functions, would be an unnecessary and disproportionate limitation on freedom of opinion and freedom of political activity.[9]

To show how the application of the duty of faithfulness worked out in practice, it is instructive to recall the facts of a few cases brought to the attention of the ILO Commission.

Herbert Bastian was a permanent official employed in the mail sorting division of the Marburg Post Office. He had entered the postal service at the age of 14 and been promoted three times. He had joined the DKP in 1973 and in 1974 was elected a member of the Marburg town council as a DKP representative. Neither his conduct in his work nor his conduct as a town councillor was the subject of any reproach. Proceedings for his dismissal were initiated in 1979 on the ground of his membership and activities in the DKP, especially his membership of the town council. In 1981 the Federal Ministry of Posts and Telecommunications offered to keep him as a wage-earner if he requested his discharge from the status of official. He refused that offer. In October 1986, the Federal Disciplinary Court held that Bastian had not violated the duty of faithfulness by his membership and activities for the DKP. The Federal Disciplinary Prosecutor appealed against that judgment. At the time of the ILO inquiry, that appeal was still pending. Subsequently, the Federal Administrative Court reversed the lower court's decision and ordered Bastian's dismissal on the ground of his political activities.

Wolfgang Jung was a teacher in Kaiserslautern holding a permanent appointment as an official. On 1 April 1985 he received a certificate from the district administration expressing thanks for 25 years of faithful service to the community. Three days later the same authority wrote to him, pointing out that "faithful service" as mentioned in the certificate meant not only fulfillment of his duties as a teacher, but also unambiguous and active support for the free democratic order. The letter stated that, since Jung was understood to be an active member of the DKP, he could not be thanked for faithful service in this wider sense; it therefore asked him to return the certificate, which had been issued in error. At the same time, the authorities initiated proceedings for Jung's dismissal. In a judgment of February 1986, the administrative court found that, while Jung had held a position at local level in the DKP, he had during

[9] See Report of the Commission, *op. cit.*, paras. 213-236.

his 25 years as a teacher never misused his position and his membership of the party had not become apparent either in his teaching or in his relations with pupils, parents and colleagues. The court concluded that there was no danger of any change in his conduct, and that he was therefore fit to remain in service. Nevertheless, it ruled that his past holding of office in the DKP constituted a breach of the duty of faithfulness to the Constitution. In order to ensure that he would not resume a similar level of activity in the DKP, the court ordered a 15 per cent reduction in pay for three years. Jung decided not to appeal against this judgment for fear that the higher court might impose the more severe sanction of dismissal.

Ulrich Eigenfeld was a permanent official of the Federal Railways. He worked as a clerk at the station of a small provincial town. There was no complaint about his conduct in his work, which had been the subject of favourable evaluation. He was an active member of the right-wing NDP. On account of its publications and statements, that party was considered to pursue aims hostile to the Constitution. Eigenfeld had held various offices in the party, including membership of its federal committee, and had stood as a candidate at elections on its behalf. He gave evidence that he had been active in efforts to make the party more moderate in its pronouncements and in expelling more extreme elements. The Federal Administrative Court recognized that the party's pronouncements had become more moderate, but observed that it had not expressly disavowed its earlier statements. It held that, whatever Eigenfeld's own conduct or attitude, his identification with the party constituted a violation of his duty of faithfulness to the Constitution. The court therefore ordered his dismissal.

This sample of cases brings out features that were present in practically all the cases brought to the attention of the ILO Commission of Inquiry. The conduct of the individuals concerned, both in their work and in their political activities, was not the subject of any reproach. The decisive factor for the courts was that they had identified themselves with and supported a party whose aims were considered hostile to the Constitution. That approach led to the paradoxical result that participation in the electoral process or exercising an elective mandate for a lawful political party became the clearest evidence of a lack of faithfulness to the Constitution. Although the concept of hostility to the basic order was not mentioned in the Constitution or other laws, but was a creation of the courts, it became the basis for limiting rights expressly granted by the Constitution, such as freedom of expression, freedom of association, and equal access to the public service according to ability, qualifications and occupational performance.[10]

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[10] *Ibid.*, paras. 481-486.

1.1 Exceptions to non-discrimination under Article 1, paragraph 2, of the Convention

In examining whether German law and practice could be justified under the "inherent job requirement" exception in Article 1, paragraph 2, of Convention No. 111, the ILO Commission gave attention to five aspects.

In the first place, the Commission noted great difference in the practice of various authorities in implementing the texts imposing the duty of faithfulness of public servants. In *Länder* ruled by the Christian Democratic Party and partners, the provisions were applied strictly. In those governed by the Social Democratic Party, a more tolerant approach had been adopted in recent years, which had largely eliminated conflict and controversy. The measures taken in the latter group of *Länder* included reconsideration of cases in which employment had previously been refused, with frequently favourable decisions for those concerned. The Government of Saarland had in June 1985 revoked the guidelines for the verification of the duty of faithfulness to the Constitution, stating that it expected officials to observe that duty not by professions of faith but by the manner in which they discharged their duties. On the other hand, in Lower Saxony, following a change of government, activities previously allowed came to be treated as grounds for dismissal. During the hearings of witnesses and its visit to Germany, the Commission inquired systematically whether any difficulties in the functioning of public services had been observed as a result of the application in certain regions or periods of a less restrictive policy. No evidence of any adverse effects was forthcoming. The Commission concluded that the more stringent test adopted by other authorities established conditions that went further than was necessary for the proper functioning of the public service.[11]

The second aspect examined by the Commission was the effect on the functioning of the public service of the activities on the basis of which it had been sought to exclude persons from the service. It noted that, in many cases, those concerned had been in service for many years. Sometimes, proceedings had been initiated only many years after the political activities complained of had begun. Frequently also, while proceedings were pending, those concerned remained at work, at times for as long as 12 years. At the hearings of witnesses, the Commission systematically sought information on whether the political activities that were the basis of allegations of violation of the duty of faithfulness had had an adverse effect on the performance of the duties of those concerned or on the functioning of the service. Concordant evidence was given that no such adverse effects had been noted in the cases of which particulars had been communicated to the Commission by the WFTU, trade unions or the individuals

[11] *Ibid.*, paras. 540-545.

concerned. The Government however referred to several other cases in which teachers had sought to indoctrinate pupils. The Commission observed that, while abuse of functions might occur in individual cases and might properly be the subject of disciplinary measures, the likelihood that such abuse would occur could not be presumed from particular political views or affiliations. Except in specific cases of misconduct (such as attempted indoctrination of pupils), it had not been established that continuing service by the various persons concerned would adversely affect the functioning of public services.[12]

The Commission found additional support for the preceding conclusion in certain cases concerning officials of the Federal Railways. Dismissal proceedings initiated against a number of such officials on account of activities within the DKP had been settled by a compromise, under which they gave up their status of officials and were allowed to stay on under employment contracts. It was admitted that their continued employment had caused no difficulty for the functioning of the railways. The Commission observed that there was no reason to suppose that the result would have been any different had they continued to serve with the status of officials.[13]

A third point related to the Government's argument that the exclusion of certain persons from public service employment was justified as a preventive measure to ensure the functioning of public services in times of conflict or crisis. In this connection, the Commission referred to the principles of necessity and proportionality as internationally recognized criteria for testing the justification for restrictions on individual rights in periods of emergency.[14] It observed that those criteria were all the more relevant where restrictions were resorted to by way of precaution against potential emergencies. Attachment to the basic constitutional order might be regarded as an inherent job requirement 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 particular positions in other sectors of the public service where corresponding safeguards were necessary on account of the nature of the functions. The Commission observed, however, that restrictions imposed on those grounds should not be extended to the employment of officials in the public service generally.[15]

The fourth aspect concerned the Government's insistence that, in line with the decision of the Federal Constitutional Court, the duty of faithfulness

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[12] *Ibid.*, paras. 546-552.

[13] *Ibid.*, para. 553.

[14] The Commission cited both a study on human rights in emergencies made by a Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities and comments made by the ILO Commission of Inquiry that had examined the observance of freedom of association Conventions in Poland, under the chairmanship of Nicolas Valticos.

[15] See Report of the Commission, *op. cit.*, paras. 554-556.

must apply to every official, without any differentiation according to his functions. The Commission found it difficult to consider that political activities or affiliations of the kind involved in the cases brought to its attention could call into question an individual's suitability for any position in the public sector. Various situations already to be found in Germany showed that it was feasible, in applying the duty of faithfulness, to distinguish according to the functions. Some *Länder*, in judging whether conduct outside the service conflicted with an official's duties, had regard to the nature of that conduct and the tasks assigned to the official. For persons employed under contracts of employment, the labour courts similarly distinguished according to the nature of the specific functions. The evidence heard by the Commission showed that there was no clear distinction in the functions assigned to officials and those employed under contracts of employment. What was feasible for one category should also be feasible for the other. That conclusion tended to be confirmed by the experience of other countries. The Commission cited a comparative study of 15 other (mainly European) countries published in 1981. The study showed that, in so far as the duty of faithfulness to the constitutional order existed at all in those countries, it was conceived not in abstract terms, but functionally and related to the post, and that the Federal Republic of Germany, with its general duty of faithfulness, departed significantly from this Western European common denominator.[16]

Lastly, the Commission considered the special situation of teachers, both because the majority of cases brought to its attention concerned teachers and because of the emphasis placed by the Government on the special responsibility of teachers to uphold the free democratic basic order and on the vulnerability of pupils to influence by teachers. The Commission noted that only exceptionally had teachers been excluded from employment on the ground that they had sought to indoctrinate pupils or had otherwise misconducted themselves in their service. In numerous cases, there had been express recognition, in performance appraisals or court decisions, of the correct conduct of teachers in these respects. Nor was there any allegation of illegal or unconstitutional conduct in their political activities. The Commission recognized that teachers had a duty not to abuse their function by indoctrination or other improper influence on pupils and that, in activities and statements outside their service, they must bear in mind the compatibility of what they did and said with their responsibilities. Whether a breach of such duties had occurred must, however, be determined on the basis of actual conduct. There could be no justification to assume that, because a teacher was active in a particular party or organization, he would behave in a manner incompatible with his duties. Where, as in the Federal Republic of Germany, teachers were free to participate in public life, it would not be appropriate to make any general distinction according to the supposed

[16] *Ibid.*, paras. 557-565.

acceptability of their political orientations. One was dealing with lawful organizations entitled to participate in the political and constitutional processes of the country. The Commission concluded that in most of the cases concerning teachers brought to its attention the justification for the measures taken, whether involving exclusion from employment or disciplinary penalties, had not been established.[17]

In the light of the foregoing considerations, the Commission concluded that the measures taken in application of the duty of faithfulness to the free democratic basic order had in various respects not remained within the limits of the restriction authorized by Article 1, paragraph 2, of Convention No. 111 on the basis of the inherent requirements of particular jobs.[18]

1.2 Exceptions to non-discrimination under Article 4 of the Convention

There remained the issues arising under Article 4 of the Convention, permitting measures to be taken against persons who are justifiably suspected of, or engaged in, activities prejudicial to the security of the State. The Commission noted that in none of the cases brought to its attention had any allegation been made (in court proceedings, internal disciplinary procedures, performance evaluation reports, etc.) that the individuals concerned had engaged in activities prejudicial to the security of the State. That fact was confirmed at the hearing by several Government witnesses, such as the Federal Disciplinary Prosecutor and the Chief of Personnel of the Ministry of Posts and Telecommunications. What had been involved in all cases was open and lawful political activity, and there had been no reproach of the actual conduct by those concerned in the course of that activity. In these circumstances, the Commission concluded that the measures taken in application of the duty of faithfulness to the free democratic order, as exemplified by the cases brought to its attention, did not fall within the exception provided for in Article 4 of the Convention.[19]

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[17] *Ibid.*, paras. 566-570.

[18] *Ibid.*, para. 573.

[19] *Ibid.*, paras. 574-581. The German media reported in May 2004 that, according to reconstituted files of the secret service of the former German Democratic Republic, a number of DKP members had received military training in the GDR between 1972 and 1989, for use in possible operations in Western Germany (although no actual cases of their being sent into action are known) – see, for example, *Frankfurter Allegemeine Zeitung* of 19 May 2004. Activities of the kind alleged would have justified measures under Article 4 of the Convention against the persons concerned. However, as mentioned above, no such allegations were made in the proceedings before the ILO Commission, either by the Government or in the documentation concerning individual cases submitted to it.

1.3 The Commission's recommendations

The Commission formulated a series of recommendations to overcome the difficulties in the application of the Convention. The main recommendation was for reexamination of existing measures by the various authorities in the Federal Republic, with due regard to the Commission's conclusions, and for action to be taken to ensure that only such restrictions on employment in the public service were maintained as could be justified under Convention No. 111. The Commission set out a number of considerations that should be taken into account in the proposed review. The essential issue should be fitness for employment. In that regard, the principle of proportionality should be observed. It implied that public servants should be subject to no greater limitations in the enjoyment of rights and freedoms accorded to citizens generally than could be shown to be necessary to ensure the functioning of the institutions of the state and public services. It also followed from the principle of proportionality that whether a person was fit for admission to employment or for continued employment in the public service must be judged, in each instance, by reference to the functions of the specific post and the implications of the actual conduct of the individual for his ability to assume and exercise those functions. In the case of applicants for employment, excessive importance should not be attributed to activities undertaken when they were not bound by any public service relationship; they should be given an opportunity to demonstrate that, once they entered such a relationship, they would respect their obligations. The prolonged periods of preparatory or probationary service provided ample time to evaluate actual conduct before a permanent appointment, with far-reaching job-security, was given. The Commission recommended that, unless the requisite changes could be brought about by other means, appropriate legislative action be taken.[20]

One member of the Commission (Professor Parra-Aranguren) dissented from its conclusions. He considered that every treaty had to respect peremptory rules of general international law, in this case those declaring fundamental human rights, and that ILO Convention No. 111 could not be interpreted as protecting individuals advocating, even by peaceful means, ideas that were against those fundamental rights. In the opinion of the other members, one could not read into the Convention exceptions other than those provided for in the instrument itself, which sufficiently took into account the security needs of States.[21]

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[20] See Report of the Commission, *op. cit.*, paras. 582-593.

[21] *Ibid.*, pp. 249-253.

2. The Government's reaction to the Commission's report

Under the ILO Constitution, the Government was required to inform the ILO whether it accepted the Commission's recommendations and, if not, whether it proposed to refer the matter to the International Court of Justice. In case of reference to the Court, it could affirm, vary or reverse any of the Commission's findings or recommendations. The Court's decision would be final. In a letter sent to the ILO in May 1987, the Government indicated its disagreement with the Commission's conclusions. It expressed agreement with the minority opinion of Professor Parra-Aranguren and maintained that law and practice in the Federal Republic were in conformity with Convention No. 111. It also stated that it did not intend to refer the case to the International Court of Justice. It remained prepared, however, to report on developments under the regular ILO supervision procedure.

The Committee of Experts on the Application of Conventions and Recommendations observed in 1988 that the ILO Constitution did not make the results of an inquiry subject to the consent of the State concerned. The Government's position therefore did not affect the validity of the Commission's conclusions. The ILO Constitution gave a right of appeal to the International Court of Justice, but the Government had chosen not to avail itself of that possibility. Those views were shared by the tripartite Conference Committee. In his article on ILO Commissions of Inquiry, Nicolas Valticos considered that, when a government chose not to appeal to the Court, the Commission's conclusions and recommendations became binding.[22]

Article 33 of the ILO Constitution provides that, in the event of failure to carry out the recommendations of a Commission of Inquiry, the Governing Body may recommend to the Conference such action as it may deem expedient to secure compliance. No such action was initiated in the German case. Developments were followed under the regular supervision arrangements.

3. Subsequent developments

In the years immediately following the ILO inquiry, the Government continued to argue that its legislation and practice were compatible with Convention No. 111. The Federal Administrative Court continued to apply the provisions relating to the duty of faithfulness to the Constitution in a strict manner. The Committee of Experts noted in 1990 that consequently, since the completion of the inquiry, an appreciable number of persons had been adversely affected

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[22] See Valticos, *op. cit.*, p. 871.

by loss or refusal of employment, demotion, suspension or loss of income. On the other hand, in cases concerning persons employed under labour contracts, the labour courts continued to apply the relevant provisions in a more flexible manner, with due regard to the nature of the functions performed. In 1991 the Committee of Experts noted that, in two judgments in favour of employees rendered in September 1989 and March 1990, the Federal Labour Court had applied criteria corresponding to those stated by the Commission of Inquiry in its recommendations with regard to the public service generally.

The Committee of Experts and the Conference Committee persisted in calling for action to implement the recommendations of the Commission of Inquiry in order to bring about compliance with the Convention. That was also the position adopted by the German Federation of Trade Unions (DGB), both in the Conference Committee and in comments sent to the ILO.

Political changes brought about improvements in the situation. In July 1988, following a change of government, the *Land* of Schleswig-Holstein abolished the practice of systematic inquiry from the authority for the protection of the Constitution in regard to applicants for employment in the public service. In June 1990, also after a change of government, Lower Saxony revoked the decree against radicals and abolished systematic inquiries in respect of applicants for employment in the public service. The *Land* government also decided to offer renewed opportunities of employment in the public service to persons who had previously been refused employment under the revoked provisions, to discontinue proceedings against all officials or salaried employees then still pending, and to offer reinstatement to persons against whom final court decisions had already become effective. In its report to the ILO on the application of Convention No. 111 in 1990, the Federal Government stressed the significance for the general political climate of the major changes in the political configuration of Central Europe in 1989, leading to German re-unification in 1990. Subsequently, it was able to report that systematic inquiries about applicants for employment in the public service had been abolished in the three remaining *Länder* – Baden-Württemberg (October 1990), Rhineland-Palatinate (December 1990) and Bavaria (December 1991).

The arrangements for German unification, however, threw up a new problem that occasioned comments by the Committee of Experts. Under the Unification Treaty, former civil servants of the German Democratic Republic were integrated into the public service of the Federal Republic under employment relations with the appropriate federal or regional authorities. However, the Treaty permitted their dismissal in defined circumstances. Under provisions in force until the end of 1993, the employment relation might be terminated by notice on account of lack of professional qualifications or of personal aptitude, redundancy or abolition of post. Furthermore, an employment relation might be terminated if the person concerned had violated the principles of humanity or

the rule of law or had been active in the GDR's security services and a continuation of the employment therefore appeared unacceptable. In 1991 the World Federation of Teachers' Unions (FISE) submitted comments to the ILO in which it alleged that a number of teachers had been arbitrarily dismissed under these provisions; FISE also provided copies of questionnaires that former civil servants of the GDR were required to complete concerning their past activities, including political activities. The Committee of Experts sought clarification from the Government on the manner in which the relevant provisions of the Unification Treaty were applied. Subsequently, it noted that most dismissals had been effected under the provisions that had ceased to have effect at the end of 1993. In 1998 the Committee took note of four decisions rendered by the Federal Constitutional Court in July 1997 in which, while upholding the constitutionality of the dismissal provisions of the Unification Treaty and the practice of putting questions concerning an individual's previous activity in State security services, it had ruled that activities in the distant past could have no or only little relevance in judging a person's current suitability for employment. The Committee of Experts also noted a judgment by a labour court that dismissal from the public service could no longer be based on the holding of specific functions in the former GDR and that account must be taken rather of the person's service record as well as his attitude towards the free political order since the collapse of the Socialist Unity Party of the GDR.

In the meantime, in 1995, the European Court of Human Rights had given judgment in the case of Dorothea Vogt (one of the persons for whom the ILO inquiry had received detailed documentation), holding that her dismissal in 1986 on account of activities in the DKP had violated the rights to freedom of expression and freedom of association guaranteed by the European Convention on Human Rights. That judgment will be considered in greater detail below. Asked by the Committee of Experts about the repercussions of the judgment, the Government stated that it was important in requiring regard to be had to the principle of proportionalilty; whether the dismissal of an official respected that principle would depend on the facts of each case. The Government observed that the Court's judgment did not provide any ground for reopening cases in which decisions had previously become final.[23]

Notwithstanding this situation in law, in a number of cases persons excluded from the public service in the pre-unification period were able to resume such employment. Reference has already been made to decisions to that effect taken in certain *Länder*. In 1991 the Committee of Experts noted that Herbert Bastian, the postal worker whose case has been mentioned above and whose

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[23] Attempts to re-open such "old" cases in the light of the *Vogt* judgment were unsuccessful, both before the German courts and before the European Court of Human Rights – see Klaus Dammann, "Kein Sieg der Menschenrechte", *Zweiwochenschrift Ossietzky*, 24 January 2004, p. 48.

dismissal had been ordered by the Federal Administrative Court after the conclusion of the ILO inquiry, had been granted a pardon by the President of the Federal Republic in July 1990 and been able to resume service.

With time, the transitional provisions of the Unification Treaty concerning persons previously employed in the public service of the GDR have tended to diminish in importance. The PDS party (successor to the Socialist Unity Party of the former GDR) now plays a normal role in the country's political life, even to the extent of participating in the governments of certain *Länder*.

IV. Cases before the European Court of Human Rights

While the ILO inquiry was in progress, the European Court of Human Rights gave judgment on two cases, brought by Julia Glasenapp and Rolf Kosiek. Both Glasenapp and Kosiek were officials on probation. Ms. Glasenapp's appointment to a teaching post in North Rhine-Westphalia had been revoked in the light of statements made by her shortly after being appointed which raised doubts as to her sincerity in declaring her allegiance to the Basic Law. Kosiek had been dismissed from a post as a lecturer at a technical college in Baden-Württemberg, on account of his activities as a member of the right-wing National Democratic Party and books that he had written. At that time, complaints under the European Convention of Human Rights were still examined in two stages, by the European Commission on Human Rights and by the Court. The Commission had considered both complaints to be receivable as raising issues under Article 10 of the Convention, which guarantees the right to freedom of expression. It had proceeded to examine whether the measures taken against the applicants were justified under the limitation clause contained in paragraph 2 of that article.[24] In the *Glasenapp* case, by nine votes to eight, the Commission had concluded that there had been a breach of Article 10. In the *Kosiek* case, by ten votes to seven, it had concluded that there had been no violation of Article 10. The cases were then brought before the Court. In two judgments pronounced in August 1986, the Court noted that, while as a general rule the guarantees laid down in the European Convention on Human Rights extended to civil servants, the right to access to the civil service was not secured by the Convention. It held that access to the civil service lay at the heart of the issues, that the authorities had taken account of the opinions and activities of the applicants merely to

[24] Under Article 10, para. 2, of the Convention, the exercise of the right to freedom of expression may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society *inter alia* in the interests of national security or public safety.

determine whether they had the qualifications required for the posts in question, and that there had therefore been no interference with the right to freedom of expression protected under Article 10 of the Convention.[25]

These decisions of the European Court of Human Rights were the subject of criticism.[26] It appears difficult to follow the Court's reasoning that refusal of employment in the public service, even if based on the political opinions of the persons concerned, did not constitute an interference in the exercise of the right to freedom of expression.

In subsequent judgments, the Court departed from the position adopted in the *Glasenapp* and *Kosiek* cases. The first case in which it reverted to the question was that of Dorothea Vogt. She was a permanent (lifetime) official holding a post of language teacher in a secondary school in Lower Saxony, who had been dismissed on account of her activities in the DKP, including candidature on behalf of that party in elections to the *Land* parliament. Her dismissal was upheld by the regional Disciplinary Court, and the Federal Constitutional Court refused to entertain an application from her on the ground of insufficient prospects of success. Following repeal of the decree on employment of extremists in Lower Saxony in 1991, Ms. Vogt was reinstated, but this measure did not provide any redress for the period during which she had been excluded from public employment. She therefore brought her case before the European Commission on Human Rights. In November 1993, the Commission concluded, by 13 votes to one, that there had been a violation of Article 10 (freedom of expression) and Article 11 (freedom of association) of the European Convention on Human Rights. The case was then referred to the Court. The Court distinguished the *Vogt* case from the *Glasenapp* and *Kosiek* cases on the ground that it involved the suspension and dismissal of a permanent civil servant. It concluded that there had been an interference with the exercise of the rights protected by Articles 10 and 11.[27] The Court accordingly proceeded to examine whether the measures taken could be justified under the limitation clauses of these articles. The

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[25] See *Glasenapp v. Germany*, Judgment of 28 August 1986, Series A, No. 104, and *Kosiek v. Germany*, Judgment of 28 August 1986, Series A, No. 105.

[26] See, in particular, Gérard Cohen-Jonathan, *La Convention européenne des droits de l'homme*, Ed. Economica, 1989, pp. 191, 198 and 463-465, and my comments in *International Labour Law Reports*, vol. 7, Martinus Nijhoff, 1989, pp. 157-160. Apart from other doubts about the justification for the Court's conclusion, it would appear that the Court erred in the *Kosiek* case in holding that access to the civil service lay at the heart of the case. Kosiek held the post in question for several years. The decision therefore involved the termination of an existing employment relationship, not access to it. The fact that Kosiek was an official on probation, while it facilitated his dismissal, was not of relevance to the characterisation of the situation. In the *Vogt* case, mentioned below, Judge Jambrek felt that there was no justification for any distinction between the *Glasenapp* and *Kosiek* cases and the later case, and that in all three cases the issue to be examined was whether the exclusions were justified under the limitation clauses in the relevant articles of the Convention.

[27] The conclusion that Article 10 of the Convention was applicable to the case was reached by 17 votes to 2, and the decision that Article 11 was applicable was taken unanimously.

central issue identified by the Court was whether these measures corresponded to a pressing social need and were proportionate to the legitimate aim of upholding the constitutional order. It noted the absolute nature of the duty of loyalty owed by every civil servant, irrespective of their function or rank. It observed that a similarly strict duty seemed not to have been imposed by any other member State of the Council of Europe, and that even within Germany a considerable number of *Länder* did not consider activities such as there in issue as incompatible with that duty. The Court noted the severe effects of dismissal of a secondary school teacher. It also noted that Ms. Vogt's post as a teacher of languages in a secondary school did involve any security risks. While a teacher must not seek to indoctrinate or exert improper influence on her pupils, no criticism had been leveled at Ms. Vogt on this point, and her work at school had been considered wholly satisfactory. Nor was there any evidence that even outside school the applicant had made any anti-constitutional statements. The Court also bore in mind that the DKP had not been banned by the Federal Constitutional Court and that consequently Ms. Vogt's activities on its behalf were entirely lawful. In the light of these considerations, the Court concluded that it had not been established that it was necessary in a democratic society to dismiss Ms. Vogt, and that the dismissal was disproportionate to the aim pursued. The Court held, by ten votes to nine, that there had been a violation of both Article 10 and Article 11 of the Convention.[28] The Court's reasoning, invoking the criteria of necessity and proportionality, was very similar to that of the ILO Commission.

Two later judgments, even though relating to somewhat different circumstances in other countries, have provided further clarification of the Court's case-law on these questions. The first case was that of *Thlimmenos v. Greece*.[29] The applicant was a Jehovah's Witness. He had served a prison sentence for refusal to wear military uniform at a time of general mobilization. In 1988 he came second out of sixty in a competitive examination for the appointment of twelve chartered accountants. However, he was refused appointment, because the legislation provided that a person who would not qualify for appointment to the civil service could not be appointed a chartered accountant and, under the Civil Servants Code, his conviction would bar him from appointment to the civil service. After unsuccessfully contesting that decision before the domestic courts, the applicant submitted the matter to the European Commission of Human Rights. In a report of December 1998, the Commission expressed the opinion, by twenty-two votes to six, that there had been a violation of Article 9 of the Convention (guaranteeing freedom of religion), taken in conjunction with Article 14 (guaranteeing the enjoyment of the rights set forth in the Convention without discrimination). The case was then brought before the Court.

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[28] See Grand Chamber Judgment of 26 September 1995 (7/ 1994/ 454/ 535).

[29] See Grand Chamber Judgment of 6 April 2000 (Case No. 34369/ 97).

The Court recalled that the non-discrimination provisions of Article 14 of the Convention had no independent existence, since they had effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols. It noted that the applicant had been refused appointment as a chartered accountant on the ground of his criminal conviction. Such treatment, as compared with other candidates, would not generally come within the scope of Article 14, since the Convention did not guarantee the right of access to a profession. However, the applicant complained of the fact that in the application of the law no distinction was made between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offences. The Court accepted that States had a legitimate interest to exclude some offenders from the profession of chartered accountant. Yet, a conviction for refusing on religious or philosophical grounds to wear military uniform did not imply dishonesty or moral turpitude likely to undermine a person's ability to exercise this profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified. He had served a prison sentence for his refusal to wear the military uniform, and the imposition of a further sanction was disproportionate. The Court concluded that the applicant's exclusion from the profession of chartered accountants did not pursue a legitimate aim and that there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a felony. Accordingly, there had been a violation of Article 14 of the Convention, taken in conjunction with Article 9.

Three points are of particular interest in the *Thlimmenos* judgment. Although the case concerned access to a profession, which as such is not dealt with in the Convention, the Court did not follow the approach it had taken in the *Glasenapp* and *Kosiek* cases, and did not even see fit to mention those cases. It considered whether, and to what extent, the facts alleged raised issues under specific provisions of the Convention. Secondly, in order to determine whether the exclusion from the profession of chartered accountant was justified, the Court went beyond the mere fact of a criminal conviction and looked at the circumstances that had occasioned the conviction. Lastly, the Court examined whether there was an objective and reasonable justification for excluding the applicant from the particular profession. In doing so, it applied a test substantially similar to that contained in Article 1, paragraph 2, of ILO Convention No. 111, namely, the inherent requirements of a particular job.

The second case – *Devlin v. UK* – arose from a refusal of employment in the Northern Ireland Civil Service. Devlin had applied for a position as an administrative assistant. After a written test and an interview, he was informed that he was being recommended for appointment subject to the satisfactory outcome of pre-appointment enquiries. Subsequently, he was informed that he had been unsuccessful, without any indication of reasons. Believing that he had

been rejected because he was a Catholic, he applied to the Fair Employment Tribunal, alleging discrimination contrary to the Fair Employment (Northern Ireland) Act 1976. The Secretary of State for Northern Ireland issued a certificate under section 42 of that Act, certifying that the refusal of employment to the applicant was an act "done for the purpose of safeguarding national security and of protecting public safety", as a result of which the Act did not apply. An application for judicial review was dismissed by the High Court, which held that, in the light of the certificate, it could not hear or adjudicate upon the complaint. The applicant submitted the matter to the European Court of Human Rights, claiming that he had been deprived of the right, laid down in Article 6, paragraph 1, of the European Convention on Human Rights, to have his claim determined by an independent and impartial tribunal.[30] The Government submitted that the applicant's complaint fell outside the scope of this provision, as it arose out of an unsuccessful application for a civil service post. It argued that the Court's case-law recognised the special status accorded in Contracting States to public servants and, in particular, their right to maintain procedures to ensure the integrity of those recruited into the civil service, and referred in this connection to the judgments in the *Glasenapp* and *Vogt* cases. The Court ruled that the applicant's claim involved the determination of a civil right, within the scope of Article 6, paragraph 1, of the Convention. It noted that in the proceedings before the domestic courts no evidence was ever presented why the applicant was considered a security risk, nor was there any scrutiny of the factual basis for the Secretary of State's certificate that employment had been refused for the purpose of safeguarding national security and of protecting public safety. The Court concluded that the issue of the certificate by the Secretary of State constituted a disproportionate restriction on the applicant's right of access to a court, and that there had accordingly been a breach of Article 6, paragraph 1, of the Convention. It made an award of monetary compensation.[31] The decision in the *Devlin* case confirms that the guarantees established by the Convention are not excluded by the fact that a dispute arises from refusal of access to the civil service.

In the light of the subsequent judgments, it appears that the decisions in the *Glasenapp* and *Kosiek* cases have been superseded. Were similar facts to recur, the Court would evaluate the facts in the light of the relevant substantive provisions of the Convention. A number of cases were submitted to the Court by persons dismissed from the public service under the transitional provisions

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[30] The applicant also invoked Articles 8 (right to respect for private and family life), 9 (right to freedom of religion), 10 (freedom of expression), 13 (right to an effective remedy for a Convention breach) and 14 (prohibition of discrimination). In the circumstances of the case and on the basis of the material before it, the Court did not consider it necessary to examine these claims.

[31] See Judgment of 30 October 2001 (Case No. 29646/95).

of the Unification Treaty or barred from legal practice following unification. In these cases, the Court confirmed that the Convention applied to public servants and accepted that there had been an interference in the enjoyment of Convention rights. It concluded, however, that the interference pursued a legitimate aim and that there were facts that justified the particular decisions, such as the applicants' activities while they had been employed in the former German Democratic Republic, false statements regarding collaboration with state security services, or inadequate professional qualifications.[32]

V. Comparison of the approaches, means of action and impact of ILO procedures and of procedures under the European Convention on Human Rights

What does the preceding review of the action taken within the ILO and before the European Court of Human Rights tell us of the relative effectiveness of these procedures? A first point to note is that the exclusion of radicals from public service employment in Germany occasioned serious differences of opinion both at the domestic level and among the international bodies called upon to judge its compatibility with standards designed to guarantee human rights. In Germany, that cleavage manifested itself among the major political parties, among the authorities of different *Länder*, within the judiciary,[33] among academics and among trade unions. The ILO Commission of Inquiry reached its conclusions by a majority, with dissent by one of the three members. The organs of the European Convention on Human Rights too were split. The Commission and the Court differed in the *Glasenapp* and *Kosiek* cases. The conclusions of the Commission in those cases and those of the Court in the *Vogt* case were reached by the narrowest of majorities.

In the light of those tensions, it is all the more significant that ultimately a substantially similar case-law has emerged, even though the provisions by reference to which the decisions were taken have varied in character. ILO Convention No. 111 deals specifically with discrimination in employment. It applies to

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[32] See Decisions on admissibility in the case of *Döring v. Germany* of 9 November 1999 and in the cases of *Bester v. Germany*, *Knauth v. Germany*, *Pettersen v. Germany* and *Volkmer v. Germany*, all of 22 November 2001.

[33] Not only was the duty of faithfulness to the Constitution interpreted differently by the Federal Labour Court and the Federal Administrative Court. There were also numerous cases in which lower-level administrative courts or the Federal Disciplinary Court ruled in favour of officials, considering that they had not violated the duty of faithfulness by their political activities outside the service, but their decisions were reversed by the Federal Administrative Court.

employment in both the public and the private sector. It contains, in addition to a definition of discrimination, specific provisions authorizing limitations (by reference to inherent job requirements and national security). The task of ILO supervisory bodies, including the Commission of Inquiry, was thus to evaluate whether the restrictions imposed on employment in the public service could be justified under the express limitations permitted by the Convention. The European Convention on Human Rights is an instrument of general scope. It guarantees a series of broadly defined rights, but includes limitation clauses. It is clear from the preparatory work that the Convention does not guarantee access to the public service or deal in any way with questions of access to employment. However, it is now established that, where a person is refused access to or excluded from employment on account of his beliefs or his political opinions or activities, the legitimacy of the decision is subject to review by the European Court in the light of the various substantive provisions of the Convention. In the context of both the ILO Convention and the European Convention, the central issue to be decided is whether restrictions imposed meet the tests of necessity and proportionality. The elements to which the European Court referred to justify its conclusion that there was a breach of the Convention in the *Vogt* case echoed those relied upon by the ILO Commission: the undifferentiated nature of the obligations imposed on officials, without distinction according to the nature of their functions, the difference of practice adopted in different *Länder*, the difference of practice in Germany as compared with other European countries, the absence of any improper conduct by those concerned in the performance of their duties, and the lawfulness of the political activities in which they had engaged.

There was a significant difference in the scope of the decisions reached in the ILO and by the European Court. Although in rare instances of inter-State complaints the Court has been called upon to assess general human rights situations against the requirements of the European Convention on Human Rights, the bulk of its work concerns claims by individuals that their rights have been violated. The Court's judgments in cases of exclusion of radicals from the public service in Germany ruled on such individual claims. The judgment in favour of Dorothea Vogt resulted in the award of redress to the claimant, but did not impose on the national authorities any obligation to adopt more general measures.[34] The conclusions reached under the ILO procedures had inverse effects. They did not pronounce on individual cases, but dealt with the compatibility of

[34] It is worth noting that, apart from Ms. Glasenapp and Mr. Kosiek, Ms. Vogt was the only public servant affected by exclusion from employment in pursuance of the measures against radicals who sought redress from the Court. The Court's rulings in the *Glasenapp* and *Kosiek* cases in 1986 may have discouraged others from taking their cases to the Strasbourg court. By the time the *Vogt* judgment was rendered, in 1995, it was too late to re-open earlier cases, and the main problem arising from the Radicals Decree had been resolved.

national law and practice with the terms of the relevant ILO Convention. The recommendations of the Commission of Inquiry thus aimed at general corrective measures. Individuals might derive benefit from the ILO conclusions only indirectly, as an outcome of any measures adopted.

There was also a difference in the legal force of the respective procedures. States parties to the European Convention on Human Rights undertake to abide by the judgments of the Court, and generally do so. The limited nature of any relief awarded to an individual litigant makes compliance easier. In contrast, the general character of the recommendations of an ILO inquiry may make it more difficult, both politically and technically, to comply. In the German case, the Government's non-acceptance of the Commission's conclusions and recommendations and its decision not to avail itself of the possibility of recourse to the International Court of Justice limited the impact of the procedure. In the absence of any move by the Governing Body to activate enforcement measures under Article 33 of the ILO Constitution, it was left to the regular supervisory bodies (Committee of Experts and Conference Committee) to exert pressure with a view to adoption of measures of the kind called for by the Commission of Inquiry. While some progress was noted in the years following the inquiry, a significant change in the application of the impugned policies occurred only after the major political upheavals in Central Europe in 1989, leading to the fall of the Communist regime in Eastern Germany and German reunification. The problems considered by certain earlier ILO inquiries, such as those relating to freedom of association in Greece and in Poland, were similarly resolved only in the wake of major political changes.

Beyond their impact in the specific cases considered, the judgments or conclusions of both the European Court and ILO supervisory bodies also establish case-law that may influence the conduct of actors in similar situations and the response thereto of international bodies. The ILO Commission of Inquiry in the German case had occasion to clarify the meaning and scope of a number of requirements of Convention No. 111. Its comments found due reflection in the general survey of these standards made by the Committee of Experts in 1988.[35] The ILO inquiry remains of interest also in the context of the continuing debate on how to reconcile respect for individual freedoms with concern for State security.

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[35] *Equality in Employment and Occupation*, General Survey of the reports on the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), International Labour Conference, 75th Session, 1988, *Report III (Part 4B)*.