



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF KOSIEK v. GERMANY

(Application no. 9704/82)

JUDGMENT

STRASBOURG

28 August 1986

In the Kosiek case*,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. W. GANSHOF VAN DER MEERSCH,
Mr. J. CREMONA,
Mr. G. WIARDA,
Mr. Thór VILHJÁLMSSON,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. G. LAGERGREN,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. R. MACDONALD,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. A. SPIELMANN,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 24 and 25 October 1985, and on 24 April and 26 and 27 June 1986,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 16 July 1984, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in an application (no. 9704/82) against the Federal Republic of Germany lodged

* Note by the Registrar: The case is numbered 5/1984/77/121. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

with the Commission on 20 February 1982 by a national of that State, Mr. Rolf Kosiek.

The applicant was originally designated by the initial K, but subsequently consented to the disclosure of his identity.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Federal Republic of Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Mr. Kosiek stated that he wished to take part in the proceedings pending before the Court and appointed the lawyer who would represent him (Rule 30).

3. On 20 July 1984, the President of the Court decided that in the interests of proper administration of justice this case and the Glasenapp case should be heard by the same Chamber (Rule 21 para. 6).

The Chamber of seven judges to be constituted included, as *ex officio* members, Mr. R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the then President of the Court (Rule 21 para. 3 (b)). On 2 August 1984, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. R. Ryssdal, Mr. D. Evrigenis, Mr. F. Gölcüklü, Mr. F. Matscher and Sir Vincent Evans (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr. Wiarda assumed the office of President of the Chamber (Rule 21 para. 5). Through the Registrar, he consulted the Agent of the German Government ("the Government"), the Delegate of the Commission and the applicant's lawyer as to the need for a written procedure. On 24 August 1984, he directed that the Agent and the applicant's lawyer should each have until 31 January 1985 to file a memorial and that the Delegate should be entitled to reply in writing within two months of the date on which the Registrar transmitted to him the last-filed memorial (Rule 37 para. 1). On 23 January 1985, he extended the first of these time-limits until 21 March.

5. On 28 September 1984, the Chamber decided to relinquish jurisdiction forthwith in favour of the plenary Court (Rule 50).

6. In a letter received on 19 December 1984, a United Kingdom non-governmental organisation, the Prison Officers' Association, sought leave under Rule 37 para. 2 to submit written comments. On 25 January 1985, the President decided not to give leave.

7. The Government's memorial was lodged at the registry on 21 March 1985, and the applicant's memorial - drafted in German, with the leave of the President (Rule 27 para. 3) - on 25 March. On 4 June, the Secretary to

the Commission informed the Registrar that the Delegate would be making his submissions orally at the hearing.

8. On 12 June, after consulting, through the Deputy Registrar, the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant, Mr. Ryssdal, who had become President of the Court on 30 May 1985, directed that the oral proceedings should open on 21 or 22 October 1985, immediately after the hearings in the Glasenapp case (Rule 38). On 5 July, he granted the members of the Government's delegation leave to speak German in these proceedings (Rule 27 para. 2).

9. The hearing was held in public in the Human Rights Building, Strasbourg, on 22 October. Immediately before it opened, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mrs. I. MAIER, Ministerialdirigentin,
Federal Ministry of Justice,

*Agent,
Counsel,*

Mr. H. GOLSONG, Legal consultant,

Mr. R. KRAFFT, Ministerialrat,

Federal Ministry of the Interior,

Mr. H. KREUZBERG, Administrative Court Judge,

Federal Ministry of Justice,

Mr. D. SCHLOTZ, Ministerialrat,

Ministry of Education and Culture of the Land of Baden-
Württemberg,

Advisers

- for the Commission

Mr. C.A. NØRGAARD, President,

Delegate;

- for the applicant

Mr. N. WINGERTER, Rechtsanwalt,

Counsel,

Mr. V. HOHBACH, Rechtsanwalt,

Mr. R. GEBAUER, Referendar,

Advisers.

The Court heard addresses by Mrs. Maier and Mr. Golsong for the Government, by Mr. Nørgaard for the Commission and by Mr. Wingerter and Mr. Hohbach for the applicant, as well as their replies to its questions.

10. On various dates between 28 June and 22 October 1985, the Commission, the Government and the applicant filed several documents, either at the Court's request or of their own motion.

On 25 October, the Court decided not to hear, as the applicant had suggested, a former Minister of Education and Culture (Kultusminister) of the Land of Baden-Württemberg.

AS TO THE FACTS

11. Mr. Rolf Kosiek, who is a German national born in 1934, lives in Nürtingen. After studying physics for several years, he sat his degree examinations (Diplomhauptprüfung) in November 1960 at the University of Heidelberg, where he took a doctorate in physics three years later. From 1 September 1962 to 31 October 1968, he worked in the First Institute of Physics at the same University, first as an employee (Angestellter) and then, from 1 April 1963, as a research assistant (wissenschaftlicher Assistent) with the status of temporary civil servant (Beamter auf Widerruf).

His appointment, initially limited to four years and subsequently extended, was terminated with his agreement after he had been told by his Director that he could not expect a further extension. According to the Government, these assistantships are used to train scientists and give them an opportunity to prepare themselves for an academic career. For this reason they are deliberately awarded on temporary contracts which should have a maximum total duration of six years.

12. On 26 October 1962, shortly after taking up his duties, Mr. Kosiek signed a statement certifying that he had been given notice of the Federal Government's decision of 19 December 1950 on anti-democratic activities by civil servants and of the decree issued on 12 September 1955 by the Land Government of Baden-Württemberg. Such a statement was required by the decree, whose first paragraph read:

"It is taken for granted that candidates for civil-service posts shall not belong to any organisation which sets out to abolish the free democratic constitutional system (freiheitliche, demokratische Grundordnung) or support such tendencies in any other way, directly or indirectly. If necessary, appointment or employment should be regarded as having been brought about by wilful deceit (arglistige Täuschung)."

The third paragraph stated that it was for the authorities concerned to take "the necessary action (disciplinary proceedings, dismissal)" "against staff (Bedienstete) who fail in their duty of loyalty".

13. In 1965, Mr. Kosiek joined the National Democratic Party of Germany (Nationaldemokratische Partei Deutschlands, NPD); he was chairman of the Rhine-Neckar branch from 1965 to May 1974. In 1968, he was appointed to the Executive Committee of the Baden-Württemberg section, of which he remained a member until 1978. In 1971, he was appointed the Executive Committee's district agent for North Baden. He was also one of the three Land deputy chairmen, an appointment which was again renewed in June 1974. From autumn 1971, he served on the NPD Federal Executive Committee, where his responsibilities included university matters; he resigned in 1979. He left the NPD on 9 December 1980; he claims that he had already informed the Minister of Education and Culture, in January 1974, that he intended to leave the party as soon as he was given tenure.

He was an NPD member of the Baden-Württemberg Parliament (Landtag) from 1 June 1968 to 31 May 1972, and stood for the party in the Federal elections in the autumn of 1972, when it failed to secure any seats in the Bundestag.

Mr. Kosiek set out his political views in two books. The first of these, published in September 1972 and reprinted several times, is entitled "Marxismus? Ein Aberglaube! Naturwissenschaft widerlegt die geistigen Grundlagen von Marx und Lenin" ("Marxism? A superstition! Science disproves the intellectual foundations of Marx and Lenin"); the second, published in 1975, is entitled "Das Volk in seiner Wirklichkeit - Naturwissenschaften und Leben bestätigen den Volksbegriff" ("The People as it really is - Science and Life confirm the Concept of the Nation").

14. In 1970, he applied for a position as lecturer (Dozent) at the State Engineering College (Staatliche Ingenieurschule) in Koblenz. In March, he passed a test there, and the college asked the Ministry of Education and Culture (Ministerium für Unterricht und Kultur) of the Land of Rhineland-Palatinate to appoint him with effect from 1 March 1971.

On 15 December 1970, the Ministry informed him that another applicant had been given the post. A year later, having learned through the press that his political activities in the NPD had been the main reason for his failure to secure the appointment, Mr. Kosiek went to court to compel the Land to employ him. His case was dismissed on 24 October 1972 by the Administrative Court (Verwaltungsgericht) of Neustadt an der Weinstrasse and, on 2 March 1977, by the Land Administrative Court of Appeal (Oberverwaltungsgericht), which refused him leave to apply to the Federal Administrative Court for review on points of law.

The Court of Appeal held that he did not afford the guarantee required by section 9(1)(2) of the Land Civil Servants Act (in its version of 14 July 1970) that he would at all times uphold the free democratic constitutional system within the meaning of the Basic Law. It based its conclusions mainly on his book "Das Volk in seiner Wirklichkeit" (see paragraph 13 above).

15. In 1972, the applicant applied for a vacant post as lecturer (Dozent) at Nürtingen Technical College (Fachhochschule). With two of the other seven candidates he took a test and was interviewed. On 14 July 1972, the Lecturers' Council (Dozentenrat) recommended the Ministry of Education and Culture to appoint him. On the same day, he was interviewed at the Ministry on the subject of his past activities as a member of the Land Parliament and his future political intentions. Immediately afterwards, he wrote to the principal of Nürtingen Technical College assuring him that he would, if appointed, keep his professional duties and private political commitment entirely separate and would not misuse his position as a teacher for political ends; he added that he had no intention of appearing in public in Nürtingen or the surrounding area as a party militant - during the election campaign for the Bundestag, for example.

The Ministry appointed him as a lecturer (Dozent zur Anstellung) with the status of probationary civil servant (Beamter auf Probe) at Nürtingen Technical College, with effect from 1 September 1972. The decision was taken by the Minister himself who, according to the Government, had known the applicant as a parliamentarian and had no doubts whatever about his loyalty to the Constitution. The Land Civil Servants Act, in its version of 27 May 1971, requires all candidates for civil-service posts - whether temporary or permanent - to give "a guarantee that they will consistently uphold the free democratic constitutional system within the meaning of the Basic Law" (sections 6(1)(2) and 8). By virtue of section 64(2) of the Act, civil servants shall undertake to bear witness (bekennen) to the said system by their every word and deed and to uphold it.

Mr. Kosiek did not have to sign a declaration of loyalty: the decree of 12 September 1955 (see paragraph 12 above) had been repealed on 4 February 1969, and it was not until 15 October 1973 that the Land Minister of the Interior issued directives implementing the decree on the appointment of extremists to the civil service which the Federal Chancellor and the Prime Ministers of the Länder had adopted on 28 January 1972 ("Ministerpräsidenten-Beschluss" - see paragraph 17 below).

On 9 November 1972, the applicant was sworn in before the principal of Nürtingen Technical College; he promised, inter alia, to abide by and uphold the Basic Law and the Land Constitution (section 65 of the Land Civil Servants Act).

16. On 17 October 1973, pursuant to section 24(1) and (2) of the Land Civil Servants Act, which makes it possible for the normal three-year probationary period to be shortened, the principal of the College requested that Mr. Kosiek be given tenure for life (Ernennung auf Lebenszeit).

After examining whether the legal conditions for tenure were fulfilled (sections 6 and 8 of the Land Civil Servants Act - see paragraph 15 above), the Ministry replied that Mr. Kosiek's attitude and political activities had given rise to doubts concerning his loyalty to the Constitution and that he might even have to be dismissed.

17. On 13 February 1974, the applicant was interviewed on the subject of his attitude to the Constitution. On 28 February, the Ministry gave him notice of dismissal with effect from 30 June. Citing, inter alia, section 38(2) of the Land Civil Servants Act, which provides for dismissal of a probationary civil servant where he has not proved himself during the probationary period, and the decree of 28 January 1972 (see paragraph 15 above), it declared him unsuitable for the post (mangelnde Eignung): as a prominent NPD official, he had approved of NPD aims which were inimical to the Constitution (verfassungsfeindlich) and had thus shown that he did not support the free democratic constitutional system by his every word and deed and was not prepared to uphold it (section 64 of the Act). According to the Ministry, the NPD behaved in a manner hostile to the Constitution since,

among other things, it rejected the idea of international understanding, human rights and the existing democratic order; specifically, it preached extreme nationalism and a racist ideology, and wished to abolish parliamentary government and the multi-party system.

The decree of 28 January 1972 on the employment of extremists is designed to ensure uniformity of administrative practice in the matter; it reiterates civil servants' legal duty of loyalty to the free democratic constitutional system and in paragraph 2 provides (Official Gazette - Gemeinsames Amtsblatt - of certain Ministries of the Land, 1973, no. 34, p. 850):

"2. Every case must be examined and decided according to its particular circumstances. Regard must be had in the process to the following principles:

2.1. Candidates

2.1.1. A candidate who engages in activities inimical to the Constitution shall not be appointed to the civil service.

2.1.2. If a candidate belongs to an organisation engaging in activities inimical to the Constitution, this fact shall cast doubt on whether he is prepared at all times to uphold the free democratic constitutional system. As a rule such doubt shall be sufficient reason for not appointing him.

2.2. Civil servants

If a civil servant <fails to comply with his duty of loyalty to the Constitution> the appointing authority shall draw the necessary conclusions on the basis of the particular facts established in his case and shall consider whether grounds exist for dismissing him from the service (Entfernung aus dem Dienst)."

German civil servants' special duty of loyalty to the State and its Constitution has been confirmed and clarified by the Federal Constitutional Court, in particular in a judgment on 22 May 1975 (Entscheidungen des Bundesverfassungsgerichts, vol. 39, pp. 334-391).

18. On 8 March 1974, the applicant lodged an objection (Widerspruch) against his dismissal. This was rejected by the Ministry on 3 May, and he instituted proceedings before the Stuttgart Administrative Court on 10 June.

On 8 April 1975, the Ministry revoked its decision of 28 February 1974 on the ground that it had failed to consult the Staff Committee (Personalrat) of the Technical College beforehand. At the same time, it again dismissed the applicant on the same grounds as in February 1974 - having interviewed him again and consulted the Staff Committee in the meantime - with effect from 30 June 1975. On 9 May, the Stuttgart Administrative Court accordingly stayed (einstellen) the proceedings before it, holding that the issues raised had been settled.

19. On 2 May 1975, Mr. Kosiek lodged an objection against his second dismissal, arguing, inter alia, that the criticisms levelled at him had been

unjustified. He asserted that it was common knowledge that he had personally and actively upheld the free democratic system. Since becoming a teacher he had resigned from several of his NPD posts, including those of chairman of the Rhine-Neckar branch, district agent for North Baden and member of the Federal Executive Committee responsible for university matters. In addition, he had deliberately restricted his political activities in the Nürtingen-Esslingen area and had not appeared there in public. His membership of a party with aims allegedly inimical to the Constitution was no reason for dismissing him. The Technical College and the Staff Committee had supported him and had testified to his personal and professional abilities. Finally, the probationary period was now over: the period which he had previously spent as a temporary civil servant should be added to the two years and seven months which he had spent as a probationary civil servant.

On 7 May, the Land Ministry of Education and Culture rejected his objection, mainly on account of the major role he had played in NPD activities. It also referred to the Federal Administrative Court's ruling that mere membership of an unconstitutional party might justify a civil servant's dismissal; that being so, it was unnecessary to establish whether the applicant had restricted his political utterances, and his professional qualifications were immaterial. Finally, probation did not end automatically under civil-service law; as he had not been established, Mr. Kosiek was still a probationer and could therefore be dismissed under section 38 of the Land Civil Servants Act.

20. On 9 June 1975, the applicant challenged the Ministry's decision before the Stuttgart Administrative Court, claiming that no definite proof had been adduced therein that his attitudes had been inimical to the Constitution. In German case-law, membership of an organisation regarded as being inimical to the Constitution was merely a possible reason for doubting a civil servant's constitutional loyalty, and every case had to be examined in detail. The Ministry's overall judgment did not satisfy this requirement. The applicant had always actively upheld the free democratic system - in 1968, for example, when the University of Heidelberg had been occupied; or in 1970 in Ulm, when he had retrieved the flag of the German Democratic Republic and handed it over to the public prosecutor; or again, as a member of the Land Parliament. The same was true of his writings. He could not be held responsible for NPD statements or actions which might be regarded as inimical to the Constitution. In any case, the party approved of the free democratic system within the meaning of the Basic Law. When the Land Minister appointed him as a probationary civil servant, he knew that he had been a member of the Federal Executive Committee (since 1971), a member of the Land Executive Committee (since 1968), the Land Executive Committee's district agent for North Baden (since 1971) and chairman of the Rhine-Neckar branch of the NPD (since 1965). It was thus illogical that

his commitment to the NPD should be seen as making him personally unsuitable and justifying his dismissal. The same inconsistency was apparent in earlier statements by the Minister. In December 1972, he had repeatedly stated - in the Land Parliament, on television and in interviews with the press - that Mr. Kosiek was not opposed to the Constitution and that his four-year record in Parliament showed as much.

21. On 26 January 1977, the Stuttgart Administrative Court set aside the decisions of 8 April and 7 May 1975.

The court held that the law and general principles precluded dismissing a probationary civil servant on grounds which had been known - and should have been taken into account - when he was appointed.

The Ministry had based its decision on facts already known in 1972 which it had not regarded at the time as indicating personal unsuitability. It had been aware from the decisions of the Conference of Land Ministers of the Interior (25 February 1972), quoted in the disputed decision of May 1974, that the NPD was regarded as having aims inimical to the Constitution, and it had also known that the applicant was an influential member of the party and an NPD member of the Land Parliament.

The fact that the Ministry had nonetheless appointed Mr. Kosiek showed that it regarded his personal conduct, notwithstanding his commitment to the NPD, as affording the necessary guarantee of allegiance to the Constitution. This had been clear from the Minister's reply to a question put to him in the Land Parliament in December 1972. Thus, when it was being determined whether the applicant had proved himself during his probation, his political conduct was relevant only in so far as it had changed in the meantime. The applicant's continuing commitment to his party could not be judged any differently from before, as the NPD's aims had not changed in the meantime. As for his book "Marxismus? Ein Aberglaube!", which the Ministry had not originally been aware of, it was not sufficient proof of opposition to the Constitution.

The court had beforehand called the applicant to give evidence explaining a number of passages in his book. It had sought such evidence notably in order to establish whether his theory of genetic and biological inequality in humans was based on racist views and whether Mr. Kosiek drew from it conclusions which were incompatible with the principles of equality and respect for human rights enshrined in the Basic Law.

22. The Ministry appealed against this judgment on 23 June 1977. It contended that it must be free to rectify any error made during the appointment procedure; it could not be compelled to establish a probationary civil servant who lacked one of the requisite qualifications. Moreover, it had since been found that the NPD did not accept the Basic Law but was actively opposed to it and the lawful institutions. The applicant's new book, "Das Volk in seiner Wirklichkeit", confirmed his personal views of the Basic Law; the Koblenz Administrative Court of

Appeal (see paragraph 14 above) had been right to conclude from it that he did not recognise the Federal Republic and its Constitution as positive values, but extolled National Socialism.

Mr. Kosiek contended that a book which had not appeared until 1975 could not be taken into account in the present proceedings. In any case, it did not give any grounds for doubting his allegiance to the Constitution; the Koblenz Court of Appeal had incorrectly summarised it and had totally distorted the views he had expressed in it (see paragraph 14 above). For the rest, he essentially repeated the arguments he had adduced at first instance.

23. On 28 February 1978, the Administrative Court of Appeal of the Land of Baden-Württemberg allowed the appeal and dismissed the applicant's action. In the light especially of the case-law of the Federal Constitutional Court, particularly its judgment of 22 May 1975 (see paragraph 17 above), it ruled that the impugned decisions were lawful.

After reviewing in detail the Ministry's arguments and evidence, the Court held that it had not been proved that the NPD was pursuing aims inimical to the Constitution, that is to say, was systematically (planvoll) and actively seeking to undermine the free democratic constitutional system, bring about its abolition or jeopardise the continued existence of the Federal Republic of Germany (Article 21 of the Basic Law). Mere membership of the NPD could not therefore be construed as a sign of doubtful allegiance. Many NPD statements nonetheless did indicate a worrying tendency, and, that being so, a political party's constitutionally suspect (verfassungsrechtlich bedenklich) views might give grounds for ascertaining the personal views of a civil servant who was a party member. A civil servant, who was bound actively to uphold the free democratic system, might accordingly be required to dissociate himself explicitly from the objectionable views of his party.

Mr. Kosiek had failed to dispel the suspicion that he approved the NPD line. On the contrary, he had identified himself with it by his many militant activities. These, and the personal views he had expressed in his book "Das Volk in seiner Wirklichkeit", cast serious doubts on his loyalty to the Constitution. In his book, which could legitimately be taken into consideration, he had played down or indeed praised, without the least reservation or criticism, circumstances and events that had marked the Third Reich. In this respect, the Land Administrative Court of Appeal shared the views of the Koblenz Court of Appeal, which had analysed the book in detail (see paragraph 14 above). Admittedly, the applicant maintained that he had written in appreciative terms only of the first phase of the Third Reich, but this showed merely that there were at least some aspects of National Socialism of which he approved, not that he disavowed it. As early as 1933, the most important fundamental rights had been suspended, separation of powers abolished, political parties disbanded, trade unions broken up and (what marked the beginning of the persecution of the Jews)

"non-Aryan" civil servants dismissed. Without any reservation or criticism the applicant judged the circumstances, events and ideas of the Third Reich preferable to the current situation. It was thus impossible to believe that he also endorsed the fundamental views and principles of the Basic Law as being a priceless asset to be protected.

The Ministry had rightly concluded that Mr. Kosiek did not give any guarantee that he would at all times uphold the free democratic constitutional system within the meaning of the Basic Law, and that he had accordingly failed to prove himself during his probation. It mattered little whether he had the necessary professional qualifications and had refrained from expressing any political views at the Technical College. Before appointing him the Minister had certainly been aware of his prominence in the NPD, but this did not make the disputed revocation of his appointment unlawful. Performance of duties as a probationary civil servant was of vital importance for determining whether a probationer could be relied on to be loyal to the Constitution. The applicant should have expected the Ministry to carry out, at the end of the probationary period, a further thorough and final assessment of matters already known to it.

24. With leave of the Court of Appeal Mr. Kosiek applied for review on points of law, but the Federal Administrative Court (Bundesverwaltungsgericht) found against him on 28 November 1980.

The Ministry's doubts about the applicant's loyalty to the Constitution - prompted by his active membership of the NPD - were justified. In this connection, the Court of Appeal had erred in regarding membership of a party as relevant only if the party deliberately sought to undermine or destroy the free democratic system - in other words, was liable to banning by the Constitutional Court under Article 21 of the Basic Law. It was in fact sufficient if the party pursued aims that were incompatible with that system. The NPD did; and the applicant, far from repudiating its aims, had approved of them. The Ministry's doubts had consequently not been prompted, as the Court of Appeal had held, by statements in the applicant's book "Das Volk in seiner Wirklichkeit" but had been corroborated and strengthened by them.

Article 5(3) of the Basic Law, which was relied on by the applicant and protected freedom of art, science, research and teaching, did not lead to any different conclusion. Academics had a large measure of professional independence but that did not absolve them from their duty of loyalty to the Constitution. Notwithstanding the first sentence of Article 5(3), they remained civil servants, and a university lecturer with the status of probationary civil servant could be dismissed for unsuitability.

The Ministry had been entitled to base its decision on Mr. Kosiek's involvement with the NPD, notwithstanding that it had been aware of this at an earlier date, and on the content of the aforementioned book, which had been published only in 1975 and mentioned in the appeal proceedings.

Lastly, the Federal Administrative Court dismissed various procedural complaints which had been raised before it.

25. On 16 March 1981, Mr. Kosiek applied to the Federal Constitutional Court to have the judgments of the Court of Appeal and the Federal Administrative Court set aside, on the ground that they contravened various Articles of the Basic Law.

In particular, he challenged the objectivity and relevance of the evidence used against him and contended that the judgments complained of had been arbitrary. The courts which had given those judgments had made no attempt to establish whether the NPD and he had, by their statements, attacked the principles of the Basic Law. The NPD and he were not in fact pursuing aims that were incompatible with the Basic Law. The views expressed in his book were covered by freedom of expression and none of them bore on any principles of the free democratic system. Moreover, they were in line with the views of most present-day historians. The judgments in issue had accordingly infringed his right, secured in Article 3 of the Basic Law, not to be discriminated against on account of his opinions. In penalising a political opponent for holding views that were not directed against the democratic system, the authorities had disregarded his right to freedom of conscience and opinion, secured in Article 4. His dismissal and the criticisms of his book amounted to unlawful interference with his freedom of expression, contrary to Article 5(1) and (3). He had also been banned from his profession (*Berufsverbot*), a measure which was incompatible with Article 12, since he could no longer find a university lectureship at his age. In dismissing him, the Land, in defiance of Article 33(1), had deprived him of rights recognised by all the other Länder (except Bavaria), which did not harass NPD members. Despite his suitability, professional qualifications and efficiency, he was being arbitrarily refused access to a civil-service post, or prevented from remaining in one, contrary to Article 33(2) and (3). Lastly, his dismissal - based on circumstances which were both lawful and known at the time of his appointment - was contrary to Article 103.

26. Sitting as a panel of three judges, the Constitutional Court decided on 31 July 1981 not to entertain the constitutional complaint, on the ground that it had insufficient prospects of success.

Citing its own case-law (judgment of 22 May 1975), it recalled firstly that the duty of loyalty to the State and the Constitution was one of the traditional principles of the civil service (Article 33(5) of the Basic Law). Anyone who was not clearly prepared at all times to uphold the free democratic constitutional system was thus unfit to hold a civil-service post. Any probationary civil servant who could not be relied upon to do so must therefore be dismissed on grounds of personal unsuitability. In this connection, membership of a party whose aims were incompatible with the free democratic system was a relevant consideration.

In the particular case, examination of the judgments challenged did not disclose any breach of constitutional law. Neither the findings of fact nor the conclusions of the Court of Appeal and the Federal Administrative Court were tainted by arbitrariness. The applicant's dismissal did not breach any of the rights he relied on.

27. As his appeal against dismissal had a suspensive effect, Mr. Kosiek was able to continue teaching at Nürtingen Technical College, but the dismissal became final after the Federal Administrative Court's judgment of 28 November 1980. He was accordingly notified on 15 December 1980 that his employment was at an end.

PROCEEDINGS BEFORE THE COMMISSION

28. Mr. Kosiek's application (no. 9704/82) was lodged with the Commission on 20 February 1982. He claimed that his dismissal was contrary to Article 10 (art. 10) of the Convention.

The Commission declared the application admissible on 16 December 1982. In its report of 11 May 1984 (Article 31) (art. 31), it found, by ten votes to seven, that the Convention had not been violated.

The full text of the Commission's opinion and of the separate opinions contained in the report is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS BY THOSE APPEARING BEFORE THE COURT

29. In their memorial and at the hearing on 22 October 1985, the Government requested the Court to find that:

"(i) the Court cannot deal with the merits of the case, on the ground that the application was incompatible with the provisions of the Convention;

alternatively

(ii) the Federal Republic of Germany did not violate the European Convention for the Protection of Human Rights and Fundamental Freedoms."

30. The Delegate of the Commission, at the close of the hearing, asked the Court to rule on the following issues:

"Was there in this case an interference with the applicant's rights under Article 10 para. 1 (art. 10-1) of the Convention and, if so, was such interference justified?"

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

31. The Government considered Mr. Kosiek's application incompatible with the provisions of the Convention. They submitted that he was claiming a right that was not secured in the Convention. In their view, the present proceedings concerned issues of access to the civil service - in this case a teaching post - and not the right to freedom of expression relied on by the applicant. At the hearing, the Government stated that they could have submitted their arguments in the form of an objection to jurisdiction, as they had done before the Commission, but that because of "the apparent complexity of the case" they were willing for the problem to be looked at in a wider context, including matters going to the merits. They submitted that Article 10 (art. 10) was inapplicable in the instant case.

Mr. Kosiek contended that the admissibility of his application had to be determined on the basis of his complaints, and before the Convention institutions he had never claimed any right of access to the civil service; he was complaining solely of the damage he had suffered on account of having disseminated his opinions in books.

The Delegate of the Commission considered the Government's argument to be ambiguous: while submitting that the application was incompatible with the provisions of the Convention, they in fact recognised that the issue to be decided in the proceedings before the Court was whether Article 10 (art. 10) applied or not. The issue of incompatibility as such had been determined by the Commission in its decision on admissibility, while the question of the applicability of Article 10 (art. 10) fell to be dealt with on the merits of the case.

32. Mr. Kosiek complained of dismissal from a lectureship - to which he had been appointed in 1972 with the status of probationary civil servant - on account of his political activities for the NPD and of the content of the two books he had written (see paragraphs 13 and 17-24 above); he claimed to be the victim of a breach of Article 10 (art. 10) of the Convention.

Such a complaint does not fall "clearly outside the provisions of the Convention" (see the judgment of 9 February 1967 in the "Belgian Linguistic" case, Series A no. 5, p. 18). It relates to the interpretation and application of the Convention (Article 45) (art. 45): in order to decide the case, the Court must inquire whether the disputed dismissal amounted to an "interference" with the exercise of the applicant's freedom of expression as protected by Article 10 (art. 10). For the Court, this is a question going to the merits, which it cannot try merely as a preliminary issue (see, *mutatis mutandis*, the aforementioned judgment of 9 February 1967, pp. 18-19; the

Airey judgment of 9 October 1979, Series A no. 32, p. 10, para. 18; and the Barthold judgment of 25 March 1985, Series A no. 90, p. 20, para. 41).

II. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

33. Mr. Kosiek claimed that his dismissal contravened Article 10 (art. 10) of the Convention, which provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Government contended that this provision was not material in the circumstances; in their submission, the present case concerned the right - not secured in the Convention - of access to a post in the civil service. This contention did not find favour with the Commission.

34. The Universal Declaration of Human Rights of 10 December 1948 and the International Covenant on Civil and Political Rights of 16 December 1966 provide, respectively, that "everyone has the right of equal access to public service in his country" (Article 21 para. 2) and that "every citizen shall have the right and the opportunity ... to have access, on general terms of equality, to public service in his country" (Article 25). In contrast, neither the European Convention nor any of its Protocols sets forth any such right. Moreover, as the Government rightly pointed out, the signatory States deliberately did not include such a right: the drafting history of Protocols Nos. 4 and 7 (P4, P7) shows this unequivocally. In particular, the initial versions of Protocol No. 7 (P7) contained a provision similar to Article 21 para. 2 of the Universal Declaration and Article 25 of the International Covenant; this clause was subsequently deleted. This is not therefore a chance omission from the European instruments; as the Preamble to the Convention states, they are designed to ensure the collective enforcement of "certain" of the rights stated in the Universal Declaration.

35. While this background makes it clear that the Contracting States did not want to commit themselves to the recognition in the Convention or its Protocols of a right of recruitment to the civil service, it does not follow that in other respects civil servants fall outside the scope of the Convention (see, *mutatis mutandis*, the Abdulaziz, Cabales and Balkandali judgment of 28

May 1985, Series A no. 94, pp. 31-32, para. 60). In Articles 1 and 14 (art. 1, art. 14), the Convention stipulates that "everyone within <the> jurisdiction" of the Contracting States must enjoy the rights and freedoms in Section I "without discrimination on any ground" (see, *mutatis mutandis*, the *Engel and Others* judgment of 8 June 1976, Series A no. 22, p. 23, para. 54). And Article 11 para. 2 (art. 11-2) in fine, which allows States to impose special restrictions on the exercise of the freedoms of assembly and association by "members of the armed forces, of the police or of the administration of the State", confirms that as a general rule the guarantees in the Convention extend to civil servants (see, *mutatis mutandis*, the *Swedish Engine Drivers' Union* judgment of 6 February 1976, Series A no. 20, p. 14, para. 37; the *Schmidt and Dahlström* judgment of the same date, Series A no. 21, p. 15, para. 33; and the *Engel and Others* judgment, *loc. cit.*).

36. The status of probationary civil servant that Mr. Kosiek had acquired through his appointment as a lecturer accordingly did not deprive him of the protection afforded by Article 10 (art. 10). This provision is certainly a material one in the present case, but in order to determine whether it was infringed it must first be ascertained whether the disputed measure amounted to an interference with the exercise of freedom of expression - in the form, for example, of a "formality, condition, restriction or penalty" - or whether the measure lay within the sphere of the right of access to the civil service, a right that is not secured in the Convention. In order to answer this question, the scope of the measure must be determined by putting it in the context of the facts of the case and of the relevant legislation.

37. The Ministry of Education and Culture gave as its reason for dismissing Mr. Kosiek his activities on behalf of the NPD (see paragraphs 17-19 and 21-24 above); during the court proceedings, the Ministry also relied on the two books that the applicant had published (see paragraphs 21-24 above). Its decision was therefore based on the political stances the applicant had adopted.

38. At the time his employer recommended to the Ministry that he should be given tenure, Mr. Kosiek had completed approximately one year of the probationary period he had to serve before he could be given a permanent post (see paragraph 16 above). The Ministry, however, considered that he had not proved himself, because he did not fulfil the condition - as required under sections 6 and 8 of the Land Civil Servants Act (see paragraphs 15 and 16 above) - that he would consistently uphold the free democratic system within the meaning of the Basic Law. This is one of the personal qualifications required of anyone seeking a post as a civil servant - whether temporary or established - in the Federal Republic of Germany. 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. The Minister

originally considered that the requirement had been fulfilled, since he had appointed the applicant as a lecturer with the status of probationary civil servant (see paragraph 15 above). After a fresh examination of Mr. Kosiek's political activities and of his publications, however, the Ministry came to the conclusion that Mr. Kosiek - who, as "a prominent NPD official", "had approved of NPD aims which were inimical to the Constitution" (see paragraph 17 above) - did not meet one of the conditions of eligibility laid down in the Act for the post in question, as a result of which it decided not to give him tenure and so dismissed him from his post as a probationary civil servant (sections 38(2), 6 and 8 of the Land Civil Servants Act; see paragraphs 17-18 above); the domestic courts before which proceedings were brought adopted essentially the same approach, except for the Stuttgart Administrative Court (see paragraphs 21, 23, 24 and 26 above). It is not for the European Court to review the correctness of their findings.

39. It follows from the foregoing that access to the civil service lies at the heart of the issue submitted to the Court. In refusing Mr. Kosiek such access - belated though the decision was -, the responsible Ministry of the Land took account of his opinions and activities merely in order to determine whether he had proved himself during his probationary period and whether he possessed one of the necessary personal qualifications for the post in question.

That being so, there has been no interference with the exercise of the right protected under paragraph 1 of Article 10 (art. 10-1).

FOR THESE REASONS, THE COURT

Holds by sixteen votes to one that there has been no breach of Article 10 (art. 10).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 August 1986.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

There are annexed to the present judgment:

- in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court, a concurring opinion of Mr. Cremona, a joint concurring opinion of Mrs. Bindschedler-Robert, Mr. Pinheiro Farinha, Mr. Pettiti, Mr. Walsh, Mr. Russo and Mr. Bernhardt and a partly dissenting opinion of Mr. Spielmann;

- a declaration by Mr. Pettiti.

R. R.
M.-A. E.

CONCURRING OPINION OF JUDGE CREMONA

While agreeing with the finding of no violation in the judgment, I am unable to agree with the essential reasoning behind it.

The applicant was dismissed from a civil service post which he held in a probationary capacity. Now the crucial question is: why was he dismissed? And it is clear that he lost his job because of political opinions which he had expressed. Because of these opinions he thus suffered a serious prejudice.

This in my view discloses an interference with freedom of expression. The majority, on the other hand, taking the view that access to the civil service lies at the heart of the issue, fail to see any such interference because, in their view, in dismissing the applicant the responsible Ministry of the Land took account of his opinions and activities merely in order to determine whether the applicant had proved himself during his probationary period and whether he possessed one of the necessary personal qualifications for the post in question.

But the fact remains that the essential basis of that decision, which indeed resulted in the applicant's dismissal, was undoubtedly the expression of certain opinions. To say, as is done in the judgment, that in dismissing the applicant the relevant authority merely took account of such opinions is an understatement. Indeed, the whole decision was based on them.

In this case, therefore, as in a picture, civil service status provides no more than the general background, whereas the dominant feature in the foreground is a prejudice suffered because of the expression of opinions.

This to my mind brings the case squarely under Article 10 para. 1 (art. 10-1) of the Convention.

Having said that, I would add briefly that in my view the interference in question was justified under paragraph 2 of that Article (art. 10-2) in that, on the established facts, it met the requirements of that paragraph, with the consequence that there was no violation of that Article (art. 10).

KOSIEK v. GERMANY JUDGMENT
JOINT CONCURRING OPINION OF JUDGES BINDSCHEDLER-ROBERT,
PINHEIRO FARINHA, PETTITI, WALSH, RUSSO AND BERNHARDT
JOINT CONCURRING OPINION OF JUDGES
BINDSCHEDLER-ROBERT, PINHEIRO FARINHA, PETTITI,
WALSH, RUSSO AND BERNHARDT

(Translation)

We held with the majority that there had been no violation of Article 10 (art. 10) because, in our view, Article 10 (art. 10) is not applicable in the instant case.

As is set out in this judgment, neither the Convention nor any of its Protocols expressly recognises a right of admission to the public service, unlike the 1948 Universal Declaration of Human Rights (Article 21 para. 2) and the 1966 International Covenant on Civil and Political Rights (Article 25(c)).

The reason why the Contracting States did not want the right of access to the public service to be secured in the Convention or its Protocols (and it must be stressed that this was no chance omission but a deliberate one) lies in the great difficulty of bringing before an international court the problem of recruitment and the arrangements for selection and admission, which by their very nature differ considerably in Council of Europe member States according to national tradition and the system governing the public service.

This does not preclude the possibility that Article 10 (art. 10) might apply even to the public service where all freedom of expression was de jure or de facto non-existent under domestic law.

PARTLY DISSENTING OPINION OF JUDGE SPIELMANN

(Translation)

1. My opinion is divided into four parts:

- concurring opinion,
- diverging opinion,
- dissenting opinion,
- final remarks.

I. Concurring opinion as to the applicability of Article 10 (art. 10)

2. I agree with the majority of the Court when it states in paragraph 35 of its judgment:

- "it does not follow <from this background> that in other respects civil servants fall outside the scope of the Convention"; and

- "Article 11 para. 2 (art. 11-2) in fine, which allows States to impose special restrictions on the exercise of the freedoms of assembly and association by 'members of the armed forces, of the police or of the administration of the State', confirms that as a general rule the guarantees in the Convention extend to civil servants".

3. The present judgment could, however, have brought out more clearly the principle that even in the case of access to the civil service, Article 10 (art. 10) of the Convention obviously may apply.

4. In this way the Court would have made its interpretation clearer.

5. This would have served as a reminder that, in the Court's view, pluralism, tolerance and broadmindedness are the best guarantees of survival for a true democratic State, which can only be strong when it is democratic.

6. The Court pointed this out in its Handyside judgment in the following terms:

"The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued." (judgment of 7 December 1976, Series A no. 24, p. 23, para. 49)

II. Diverging opinion on the application of Article 10 (art. 10)

7. In paragraph 36 of its judgment, the Court states that "the status of probationary civil servant that Mr. Kosiek had acquired through his appointment as a lecturer ... did not deprive him of the protection afforded by Article 10 (art. 10)".

8. I cannot but share this view, particularly as it is noted in the same paragraph of the judgment that "this provision is certainly a material one in the present case, but in order to determine whether it was infringed it must first be ascertained whether the disputed measure amounted to an interference with the exercise of freedom of expression - in the form, for example, of a 'formality, condition, restriction or penalty' ...". Nevertheless, in deciding in paragraph 39 that there had been no interference with the exercise of the right protected under paragraph 1 of Article 10 (art. 10-1), has the Court not implicitly decided that paragraph 1 of Article 10 (art. 10-1) of the Convention was applicable in this case? After all, if access to the civil service was to remain outside the ambit of Article 10 (art. 10), it would surely have been unnecessary to consider whether there had been any interference in the instant case or not.

9. I should have preferred the Court to express its view on this more explicitly, however, as I consider the point raised by Mr. Kosiek to be of primary importance in a democratic society.

10. I should also have preferred there to be a separate examination of the relevant issue, namely that the decision on admission to the civil service was dependent on the assessment concerning Mr. Kosiek's freedom of expression and that the Court should accordingly have considered under paragraph 2 of Article 10 (art. 10-2) whether or not there had been legitimate interference.

III. Dissenting opinion

11. My dissenting opinion concerns the following points:

- the question of access to the civil service; and
- the violation of Article 10 (art. 10) in the particular circumstances.

A. Access to the civil service

12. I do not share the opinion of the majority of the Court, who state (at paragraph 36 in fine of the judgment) that the right of access to the civil service is not secured in the Convention. That assertion seems to me to be too categorical.

13. While the Contracting States did not wish to commit themselves to recognising a right of access to the civil service in the Convention or its

Protocols, the High Contracting Parties nonetheless undertook in Article 1 (art. 1) of the Convention to secure "to everyone within their jurisdiction" the rights and freedoms guaranteed in the Convention.

It follows that access to the civil service must not be impeded on grounds protected by the Convention (for example, freedom of opinion, freedom of expression).

14. Taken to its extreme, the reasoning of the majority of the Court could authorise a State to refuse to admit to the civil service candidates who, while fulfilling all the requirements of nationality, age, health and professional qualifications, did not satisfy certain criteria of race, colour or religion.

Obviously such a situation is unthinkable for all the member States of the Council of Europe.

B. Violation of Article 10 (art. 10) of the Convention

15. The majority of the Court holds that there was no violation of Article 10 (art. 10) (paragraph 39).

16. It does so in the following terms:

"It follows from the foregoing that access to the civil service lies at the heart of the issue submitted to the Court. In refusing Mr. Kosiek such access - belated though the decision was -, the responsible Ministry of the Land took account of his opinions and activities merely in order to determine whether he had proved himself during his probationary period and whether he possessed one of the necessary personal qualifications for the post in question.

That being so, there has been no interference with the exercise of the right protected under paragraph 1 of Article 10 (art. 10-1)."

17. First of all, I should like to state that, in my opinion, access to the civil service was not at all at the heart of the issue submitted to the Court.

Quite on the contrary, at the heart of the issue were the freedoms of expression and opinion enjoyed by Mr. Kosiek by virtue of the provisions of the Convention.

18. I accordingly think that the crucial matters in the case are the following:

- was there interference by the State?
- was such interference necessary in a democratic State (the question of proportionality)?

(a) Interference

19. In paragraph 37 of the judgment it is noted:

"The Ministry of Education and Culture gave as its reason for dismissing Mr. Kosiek his activities on behalf of the NPD ...; during the court proceedings, the Ministry also relied on the two books that the applicant had published Its decision was therefore based on the political stances the applicant had adopted."

20. As stated earlier (paragraph 16 above), the majority of the Court, after considering the national legislation on civil servants in paragraph 38 of the judgment, reached the conclusion that there had not been any interference in the instant case with the exercise of the right protected under paragraph 1 of Article 10 (art. 10-1).

21. I follow the majority of the Commission in thinking that the reaction of the competent Ministry of the Land must be regarded as a manifest interference with the exercise of the rights secured in Article 10 para. 1 (art. 10-1) to all citizens within the jurisdiction of the member States of the Council of Europe and thus likewise secured to Mr. Kosiek.

(b) Necessary in a democratic society

22. If one accepts that there was interference in Mr. Kosiek's case, the crucial point - which was not examined by the Court, but the principle of which, I think, far transcends the particular facts submitted to it - seems to me to be whether such interference was necessary in a democratic society such as the Federal Republic of Germany.

23. It should be remembered that paragraph 2 of Article 10 (art. 10-2) provides:

"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

24. It follows from this text that many factors may justify interference by the State with the right to freedom of expression.

25. In this connection, it is of interest to bear in mind the position taken up by the Government of the Federal Republic of Germany at the public hearing on 21 October 1985 in the Glasenapp case.

The Agent of the Government said (translation from the German):

"The fall of the Weimar Republic was due among other things to the fact that the State took too little interest in the political views of its civil servants, judges and soldiers as a result of a misunderstanding of liberal principles. The officials of the Weimar Republic thus included those whose sympathies lay more with the former monarchy or with movements of the far right or far left and who, in the economic recession of the 1920s and the many political conflicts of that period, did not uphold the democratic Constitution, or the State based on the rule of law. That was a crucial contributing factor in the repeal of the democratic Weimar Constitution, which had established a State based on the rule of law, and in the emergence of the National Socialist dictatorship. The lessons from this historical experience were learned, and special provisions were included in the Basic Law of the Federal Republic of Germany, covering among other things the organisation of the civil service, which was thus constitutionally safeguarded. That is why, in the Federal Republic of Germany,

no one can become a civil servant who does not afford a guarantee of constant loyalty to the order established in the Basic Law."

26. I cannot share this excessively generalised view. History has shown beyond any doubt that the Weimar Republic did not collapse on account of a few civil servants "whose sympathies lay more with the former monarchy or with movements of the far right or far left", but for infinitely more complex and more deep-seated reasons.

In this respect the Federal Republic of Germany is not comparable with the Weimar Republic.

27. A second argument expounded by the Agent of the Government to justify current legislation in the Federal Republic of Germany was the following (translation from the German):

"... Germany is a divided nation whose position bordering on the Communist States of the Warsaw Pact exposes it to special dangers. This requires us to take additional precautions to safeguard our free democracy and makes us different from other Council of Europe States."

28. Without wishing to enter into a debate on that argument, I consider nonetheless that the Federal Republic of Germany is not the only country in such a geographical position.

Yet it is the only country to have the legislation complained of.

29. However that may be, I think that in the particular case before the Court both the historical and the geographical arguments advanced show sufficiently in law that the measure taken in respect of Mr. Kosiek was clearly disproportionate to the aim pursued.

30. The same conclusion is reached, in my opinion, if one looks, as the Commission did, at the factors which are relevant to the question of justification, namely:

- (i) the nature of the post occupied by the applicant;
- (ii) the applicant's behaviour in the post and his applications for other posts;
- (iii) the circumstances in which the disputed opinion was expressed; and
- (iv) the nature of the opinions attributed to the applicant.

31. Contrary to what the majority of the Commission thought, I think that the disputed measure was unnecessary in a democratic society for any of the purposes listed in Article 10 para. 2 (art. 10-2) of the Convention.

Here I entirely concur with Mr. Fawcett when he says in his dissenting opinion:

"However, I do not find it shown that the imposition of the penalty of dismissal on the applicant was, in all the circumstances, 'necessary in a democratic society', as required by Article 10 para. 2 (art. 10-2). ... in any case a public servant cannot both be said to be a danger to national security, or public safety, or the maintenance of order, under Article 10 para. 2 (art. 10-2), and be also allowed to hold his post for over six years from that finding." (my emphasis)

32. I am accordingly of the opinion that in the Kosiek case there was a violation of Article 10 (art. 10) of the Convention, although I would point out that obviously I do not at all share the applicant's views; such views remind me of events in the still too recent past, which we hope the community of the Council of Europe's member States has put behind it forever.

IV. Final remarks

33. Looking at the matter generally, I wonder whether in 1986 - nearly sixty years after the Weimar Republic and more than forty years after the end of the Second World War - the impugned practice of the Federal Republic of Germany really is necessary in order to safeguard democracy.

I wonder this all the more as I consider the Federal Republic to be a true democracy. Was it not the first country in postwar Europe to abolish the death penalty in its Constitution?

Is it not also the case that in Saarland the impugned practice has been abolished?

It is desirable that the other Länder and the Federation should follow this example.

34. In particular, while not overlooking that it is not part of the Court's function to seek settlements, I think it would be in the interests of all the parties if a satisfactory solution to Mr. Kosiek's case could be found at national level.

This would also be in the spirit of the European Convention on Human Rights.

DECLARATION BY JUDGE PETTITI

(Translation)

I agree with paragraphs 2 to 6 of Judge Spielmann's separate opinion set out above.