COURT (GRAND CHAMBER)

CASE OF VOGT v. GERMANY

(Application no. 17851/91)

JUDGMENT

STRASBOURG

26 September 1995

In the case of Vogt v. Germany[1],

The European Court of Human Rights, sitting, in accordance with Rule 51 of Rules of Court A[2], as a Grand Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr R. BERNHARDT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr R. MACDONALD,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr S.K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,
Mr M.A. LOPES ROCHA,
Mr G. MIFSUD BONNICI,
Mr D. GOTCHEV,
Mr P. JAMBREK,
Mr K. JUNGWIERT,
Mr P. KURIS,

and also of Mr H. PETZOLD, *Registrar*,

Having deliberated in private on 25 February and 2 September 1995,

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

---

1 The case is numbered 7/1994/454/535. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2 Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 March 1994 and by the German Government ("the Government") on 29 March 1994, 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"). It originated in an application (no. 17851/91) against the Federal Republic of Germany lodged with the Commission under Article 25 (art. 25) by a German national, Mrs Dorothea Vogt, on 13 February 1991.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Article 48 (art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 10 and 11 (art. 10, art. 11) of the Convention and also, in the case of the Commission's request, of Article 14 (art. 14).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that she wished to take part in the proceedings and designated the lawyers who would represent her (Rule 30); the President gave her lawyers leave to use the German language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 March 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Matscher, Mr L.-E. Pettiti, Mr S.K. Martens, Mr J.M. Morenilla, Mr G. Mifsud Bonnici, Mr P. Jambrek and Mr K. Jungwiert (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's observations on 9 and 11 August 1994 and the Government's memorial on 17 August 1994.

On 19 August 1994 the Commission produced various documents, as requested by the Registrar on the President's instructions.

5. By a letter of 4 November 1994 the Agent of the Government sought leave to submit an additional memorial and requested that the hearing initially set down for 23 November be postponed. After once again consulting - through the Registrar - the Agent of the Government, the

applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rule 38), Mr Ryssdal granted these requests. Pursuant to the order made on 16 November 1994, the Registrar received the Government's additional memorial on 5 January 1995 and the applicant's observations in reply on 3 February 1995. On 15 February 1995 the Secretary to the Commission informed the Registrar that the Delegate would make his submissions at the hearing.

6. On 26 January 1995 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51). The Grand Chamber comprised as ex officio members the President and the Vice-President, Mr Bernhardt, who in this case was already sitting as national judge, together with the other members of the Chamber. The names of the remaining ten judges were drawn by lot by the President in the presence of the Registrar on 27 January 1995, namely Mr F. Gölcüklü, Mr R. Macdonald, Mr A. Spielmann, Mr J. De Meyer, Mr I. Foighel, Mr A.N. Loizou, Mr F. Bigi, Mr M.A. Lopes Rocha, Mr D. Gotchev and Mr P. Kuris (Rule 51 para. 2 (a) to (c)). Subsequently, Mrs E. Palm replaced Mr Bigi, who was unable to take part in the further consideration of the case.

7. In accordance with the decision of the President, who had given the Agent of the Government too leave to use the German language (Rule 27 para. 2), the hearing took place in public in the Human Rights Building, Strasbourg, on 22 February 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr J. MEYER-LADEWIG, Ministerialdirigent,
Federal Ministry of Justice, *Agent*,
Mr H. WURM, Ministerialrat,
Federal Ministry of the Interior,
Mr B. FEUERHERM, Ministerialrat, Ministry for
Cultural Affairs of the Land of Lower Saxony, *Advisers*;

(b) for the Commission

Mr S. TRECHSEL, *Delegate*;

(c) for the applicant

Mr K. DAMMAN,
Mr P. BECKER,
Mr O. JÄCKEL, Rechtsanwälte, *Counsel*.

The Court heard addresses by Mr Trechsel, Mr Becker, Mr Jäckel, Mr Damman and Mr Meyer-Ladewig, and replies to a question put by it.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

8. Mrs Dorothea Vogt, a German national born in 1949, lives in Jever in the Land of Lower Saxony.

9. After studying literature and languages at the University of Marburg/Lahn for six years, during which time she became a member of the German Communist Party (Deutsche Kommunistische Partei - "DKP"), in November 1975 she sat the examination to become a secondary-school teacher (wissenschaftliche Prüfung für das Lehramt an Gymnasien). She did her teaching practice (Vorbereitungsdienst für das Lehramt) from February 1976 to June 1977 at Fulda in the Land of Hesse. In June 1977 she sat the second State examination to become a secondary-school teacher (zweite Staatsprüfung für das Lehramt an Gymnasien) and obtained a post from 1 August 1977 as a teacher (Studienrätin), with the status of probationary civil servant (Beamtenverhältnis auf Probe), in a State secondary school in Jever. On 1 February 1979, before the end of her probationary period, she was appointed a permanent civil servant (Beamtin auf Lebenszeit).

10. Mrs Vogt taught German and French. In an assessment report drawn up in March 1981 her capabilities and work were described as entirely satisfactory and it was stated that she was held in high regard by her pupils and their parents and by her colleagues.

A. Disciplinary proceedings

1. Before the Weser-Ems regional council

11. After a preliminary investigation, the Weser-Ems regional council (Bezirksregierung Weser-Ems) issued an order (Verfügung) on 13 July 1982 instituting disciplinary proceedings against the applicant on the ground that she had failed to comply with the duty of loyalty to the Constitution ("duty of political loyalty" - politische Treuepflicht) that she owed as a civil servant under section 61 (2) of the Lower Saxony Civil Service Act (Niedersächsisches Beamtengesetz - see paragraph 28 below). She had, it was said, engaged in various political activities on behalf of the DKP since the autumn of 1980 and in particular had stood as the DKP candidate in the 1982 elections to the Parliament (Landtag) of the Land of Lower Saxony.

12. The "indictment" (Anschuldigungsschrift) of 22 November 1983, drawn up in connection with the disciplinary proceedings, specified eleven public, political activities that the applicant had engaged in for the DKP,

such as distributing pamphlets, representing the DKP at political meetings, being a party official in a constituency and standing in the federal elections of 6 March 1983.

13. On 15 July 1985 the proceedings were stayed in order to widen the investigations to include further instances of the applicant's political activity that had come to light in the meantime.

14. In a supplementary "indictment" of 5 February 1986 Mrs Vogt was accused of also failing to comply with her duties as a civil servant in that:

(a) she had been a member of the "Executive Committee" (Vorstand) of the Bremen/North Lower Saxony regional branch (Bezirksorganisation) of the DKP since the end of 1983; and

(b) she had taken part in and addressed the DKP's 7th party congress, held from 6 to 8 January 1984 in Nuremberg, as Chairperson (Kreisvorsitzende) of the Wilhelmshaven/Friesland local branch of the party.

15. After a further stay of proceedings on 23 June 1986, a second supplementary "indictment" was drawn up on 2 December 1986, which specified four other political activities considered incompatible with the applicant's civil-servant status, namely:

(a) her candidature for the DKP in the elections to the Parliament of the Land of Lower Saxony on 15 June 1986;

(b) the fact that she was still a member of the "Executive Committee" of the Bremen/North Lower Saxony regional branch of the DKP;

(c) the fact that she was still Chairperson of the Wilhemshaven/Friesland local branch of the DKP; and

(d) her participation in the DKP's 8th party congress from 2 to 4 May 1986 in Hamburg as a party delegate.

16. By an order of 12 August 1986 the Weser-Ems regional council notified the applicant that she had been temporarily suspended from her post, stating in particular as follows:

> "Although you knew the views of your superiors and the case-law of the disciplinary courts you have nevertheless, over a considerable period of time, deliberately violated your duty of oyalty. For a permanent civil servant that is anextraordinarily serious breach of duty. Civil servants, whosestatus is founded on a special relationship of trust with theState and who, by taking the oath, have vowed to uphold the lawand freedom, destroy this basis of trust, which is essential forthe continuation of their relationship with their employer[Dienstverhältnis], if they deliberately support a party whoseaims are incompatible with the free democratic constitutionalsystem. This is the position in the present case."

17. From October 1986 Mrs Vogt was paid only 60 per cent of her salary (Dienstbezüge).

2. Before the Disciplinary Division of the Oldenburg Administrative Court

18. Before the Disciplinary Division of the Oldenburg Administrative Court (Disziplinarkammer des Verwaltungsgerichts) the applicant, who by her own account has been a member of the DKP since 1972, argued that her conduct could not amount to a failure to fulfil her duties as a civil servant. By being a member of the party and carrying out activities on its behalf she had availed herself of the right of all citizens to engage in political activity. She had always carried out such activity within the law and within the limits laid down in the Constitution. Her action to promote peace within the Federal Republic of Germany and in its external relations and her combat against neo-fascism were in no way indicative of an anti-constitutional stance. The DKP, whose aims had always been wrongly alleged (but never proven) to be anti-constitutional, took part lawfully in the process of forming political opinion in the Federal Republic of Germany. Lastly, according to a report issued by a Commission of Inquiry of the International Labour Office on 20 February 1987, the institution of disciplinary proceedings against civil servants on account of their political activities on behalf of a party that had not been banned breached International Labour Organisation (ILO) Convention No. 111 concerning discrimination in respect of employment and occupation. It also violated Article 10 (art. 10) of the European Convention on Human Rights.

19. In its judgment of 15 October 1987 the Disciplinary Division dismissed applications by Mrs Vogt to have the proceedings stayed and witnesses examined. The division ordered that all the "charges" against Mrs Vogt be dropped except those concerning her membership, as such, of the DKP and of the "Executive Committee" of the Bremen/North Lower Saxony regional branch, her chairing of the Wilhelmshaven branch of the DKP and her candidature in the elections to the Lower Saxony Land Parliament on 15 June 1986.

20. On the merits, the Disciplinary Division held that the applicant had failed to comply with her duty of political loyalty and ordered her dismissal as a disciplinary measure. It granted her a sum equivalent to 75 per cent of her pension entitlement at that date, to be paid for a six-month period.

The division found in the first place that neither ILO Convention No. 111 nor the recommendations made in the Commission of Inquiry's report of 20 February 1987 constituted a bar to the opening of disciplinary proceedings.

It considered that active membership of a political party that pursued anti-constitutional aims was incompatible with a civil servant's duty of political loyalty. The DKP's aims, as described in the Mannheim programme of 21 October 1978 (see paragraph 22 below), were clearly opposed to the free democratic constitutional system of the Federal Republic of Germany. A party could be held to be anti-constitutional even

if it had not been banned by the Federal Constitutional Court (Bundesverfassungsgericht) under Article 21 para. 2 of the Basic Law (Grundgesetz - see paragraph 25 below). Through the active role which she played within the DKP the applicant had therefore clearly supported aims that were contrary to the Constitution.

The Disciplinary Division added that the rule, laid down in the first sentence of Article 48 para. 2 of the Basic Law (see paragraph 25 below), according to which no one may be prevented from taking office as a member of parliament, could not justify the applicant's standing as the DKP candidate in regional elections. This rule did not apply to measures, such as disciplinary proceedings, which initially had a different purpose and restricted the freedom to stand for election to, and to sit as a member of, parliament only as an indirect and unavoidable consequence of their implementation.

The duty of political loyalty, which admittedly restricted civil servants' fundamental rights, was one of the traditional principles of the civil service and had constitutional status by virtue of Article 33 para. 5 of the Basic Law (see paragraph 25 below). It followed that this duty took precedence over the provisions of international instruments such as the European Convention.

The applicant had moreover carried out her political activities despite being familiar with the case-law establishing that active membership of the DKP was incompatible with the duty of political loyalty. She must have been aware, at the latest once the Lower Saxony Disciplinary Court (Niedersächsischer Disziplinarhof) had delivered its judgment of 24 June 1985, which was published in an official education-authority circular and was brought to the attention of the applicant in person, that her conduct was in breach of her duties (pflichtwidriges Verhalten). Mrs Vogt had accordingly to be dismissed for having betrayed the relationship of trust between herself and her employer. Throughout the disciplinary proceedings she had moreover repeatedly indicated that she intended to continue her political activities for the DKP despite the warnings she had received. The fact that she had done her work satisfactorily for many years and that she had been held in high regard by her pupils and their parents alike was immaterial.

The Disciplinary Division finally ordered that Mrs Vogt should be paid 75 per cent of her pension allowance for a period of six months. It did so in recognition of the fact that apart from her breach of the duty of loyalty Mrs Vogt had always performed her duties unexceptionably and enthusiastically and needed some income to be protected from immediate hardship.

3. In the Lower Saxony Disciplinary Court

21. On 18 March 1988 the applicant lodged an appeal against the above judgment with the Lower Saxony Disciplinary Court, reiterating her previous arguments (see paragraph 18 above).

22. In a judgment of 31 October 1989 the Disciplinary Court dismissed Mrs Vogt's appeal and upheld the Administrative Court's judgment in all respects.

It pointed out that, by carrying out activities on behalf of the DKP, the applicant had breached the duty of political loyalty that she owed in accordance with Article 33 para. 5 of the Basic Law, taken together with section 61 (2) of the Lower Saxony Civil Service Act. Under those provisions, civil servants must at all times bear witness to the free democratic constitutional system within the meaning of the Basic Law and uphold that system. They must unequivocally dissociate themselves from groups who criticise, campaign against and cast aspersions on the State, its institutions and the existing constitutional system. As a result of her activities as a member of the DKP the applicant had failed to satisfy these requirements. The DKP's political aims were incompatible with that system.

The fact that the Constitutional Court had not banned the DKP did not prevent other courts from finding that the party was anti-constitutional, as the Federal Administrative Court and the Disciplinary Court itself had done convincingly in judgments of 1 February 1989 and 20 July 1989. An analysis of the still current Mannheim programme made by Mies and Gerns in their book on the DKP's methods and objectives (Weg und Ziel der DKP, 2nd edition, 1981) showed that the party, which aimed to establish a regime similar to that existing in the communist countries around 1980, continued to be guided by the principles of Marx, Engels and Lenin. Article 48 para. 2 of the Basic Law and the corresponding legislation of the Land of Lower Saxony securing the right to take office as a member of parliament did not set limits on the duty of political loyalty, since those provisions were not applicable to impediments resulting from disciplinary proceedings. The court held that the applicant's reference to Article 5 para. 1 of the Basic Law, which secured the right to freedom of expression, was not relevant as the provisions governing the civil service mentioned in Article 33 para. 5 of the Basic Law had to be regarded as general laws within the meaning of Article 5 para. 2 of the Basic Law (see paragraph 25 below). Similarly, the European Court of Human Rights had ruled that a decision by a competent authority relating to admission to the civil service did not amount to an interference with freedom of expression. The same approach applied in cases where a person had already been appointed to a permanent civil service post.

Mrs Vogt's conduct had been unlawful. By holding such a senior political post within the DKP, she necessarily espoused anti-constitutional

aims and had therefore to be considered to be opposed to the Constitution herself, although she proclaimed her attachment to the Basic Law. It was not possible to support both systems at the same time.

Even though Mrs Vogt sought above all to achieve some of the DKP's short-term objectives such as reducing unemployment, promoting peace and eliminating so-called Berufsverbote (prohibitions on pursuing various occupations), this did not mean that her conduct was not culpable. The DKP's aims were admittedly not all anti-constitutional; some of them were compatible with the Basic Law. However, civil servants could not, as a means of furthering their own political objectives, make use of a party with anti-constitutional aims and help it to come to power. In this connection the Disciplinary Court referred to the following observations made by the Federal Administrative Court (Bundesverwaltungsgericht) in a judgment of 20 January 1987, adding that it adopted them as it was convinced that exactly the same reasoning applied to the case before it:

> "It is admittedly possible to accept the view of the Federal Disciplinary Court [Bundesdisziplinargericht] that the official in question does not seek to change the system of government of the Federal Republic of Germany by the use of force and that this declaration cannot be dismissed as mere 'lip-service'. It is also possible to accept his claim that he is mainly concerned with correcting what he perceives to be a discrepancy between the principles laid down in the Constitution and their application in practice in the Federal Republic of Germany and that he is profoundly sincere in his wish to establish a society that is more just, particularly in the economic sphere. However, contrary to the view taken by the Federal Disciplinary Court, this does not mean that he is entitled to see in the DKP the political grouping through which he believes he can achieve his ideal political order. It appears doubtful whether the view of the Constitution espoused by the official and described above reflects accurately the principles enshrined in the Basic Law. It is not necessary to resolve that question here. In its judgment banning the former Communist Party (KPD) (BVerfGE 5, p. 85), the Federal Constitutional Court held that not only the 'tactics of conflict' employed by the former KPD but also the different phases of the process leading to attainment of its final objective of 'socialist rule' [sozialistische Herrschaft], namely proletarian revolution by peaceful or violent means and the triumph of the working class ..., were incompatible with the free democratic constitutional system. [It] also stated that intensive propaganda and persistent unrest aimed at establishing - even if this was not to be achieved in the near future - a political regime that was clearly contrary to the free democratic constitutional system inevitably caused direct and immediate harm to that system ... The Federal Constitutional Court thus also unquestionably held that the transitional stages of this process, which were of indefinite duration [and which the party sought to impose] through intensive propaganda and persistent unrest were incompatible with the free democratic constitutional system (BVerwGE 47, pp. 365 and 374). Hence, contrary to the view taken by the Federal Disciplinary Court, the civil servant's assertion that he did not intend to change the Federal Republic of Germany's political system by violent means, which is moreover consistent with many statements made by his party, is of no legal significance (BVerwGE 76, p. 157)."

The court also considered that the applicant's commitment to changing the DKP's policies could not exculpate her. The political loyalty owed by civil servants entailed a duty for them to dissociate themselves

unequivocally from groups which criticised or cast aspersions on the State and the existing constitutional system. The attitude of civil servants who, even if they campaigned within the DKP for the renunciation of aims that were contrary to the Constitution, showed outside the party, through the political offices they held, that they unreservedly supported its programme and policy, was incompatible with such a duty. For as long as the DKP had not abandoned its anti-constitutional aims, civil servants' duty of political loyalty prevented them from actively working for it. This remained valid even where it was their intention to bring the party closer to democratic values. Moreover, during the disciplinary proceedings the applicant had declared her unconditional support for the DKP's aims, as set out in the Mannheim programme.

Like the Administrative Court, the Disciplinary Court found that Mrs Vogt had knowingly breached her professional obligations. Although she was aware of the case-law and her superiors' views on the subject, she had continued and even stepped up her activities on behalf of the DKP. Her dismissal had therefore been justified, since a civil servant who thus persisted in breaching her duties and refusing to see reason (unbelehrbar) was no longer capable of serving the State, which must be able to rely on its servants' loyalty to the Constitution. The court added that such a breach of duty was especially serious in the case of a teacher, who was supposed to teach the children entrusted to her care the fundamental values of the Constitution. Parents, who because of compulsory education had to send their children to State schools, were entitled to expect the State to employ only those teachers who unreservedly supported the free democratic constitutional system. The State was under a duty to dismiss teachers who played an active role in an anti-constitutional organisation.

The court added that a radical change in a civil servant's attitude could affect its assessment of the seriousness of professional misconduct. However, throughout the disciplinary proceedings, far from cutting down on her activities on behalf of the DKP, the applicant had in fact increased them. It followed that a more lenient disciplinary measure, aimed at persuading her to abandon her political activities within the DKP, was bound to fail. Accordingly, it was impossible to continue to employ her as a civil servant and her dismissal was inevitable. Her otherwise blameless conduct in carrying out her teaching tasks did not change the situation in any way, since the basis of trust that was essential for her to continue as a civil servant was lacking.

B. Proceedings in the Federal Constitutional Court

23. On 22 December 1989 the applicant lodged a constitutional complaint (Verfassungsbeschwerde) with the Federal Constitutional Court.

Sitting as a panel of three judges, the court decided on 7 August 1990 not to entertain the constitutional complaint, on the ground that it had insufficient prospects of success.

In the Constitutional Court's view, the competent courts' analysis was based on the conviction that, by her membership of the DKP and her active role within that party, the applicant had breached her duties as a civil servant. This conclusion was well-founded and in no way arbitrary. After the commencement of the disciplinary proceedings, Mrs Vogt had herself stated that there was no point, section or part of the DKP's programme of which she disapproved, thus endorsing unconditionally the party's aims set out in the Mannheim programme. The disciplinary tribunals had been entitled to find that the DKP's aims were anti-constitutional, notwithstanding the provisions of Article 21 para. 2 of the Basic Law. Regard being had to the applicant's intractability in respect of her political loyalty, the disciplinary courts had rightly considered that the basis of trust necessary for Mrs Vogt to continue to work as a civil servant was lacking, despite the fact that she had declared herself to be in favour of a change in the party's policy and had otherwise carried out her teaching tasks in a way that was irreproachable. The applicant's dismissal had therefore not amounted to a breach of the principle of proportionality as regards her constitutional rights. Accordingly, there had been no violation of Article 33 paras. 2, 3 and 5 of the Basic Law.

C. Subsequent developments

24. From 1987 to 1991 the applicant worked as a playwright and drama teacher at the North Lower Saxony regional theatre (Landesbühne) in Wilhelmshaven.

From 1 February 1991 she was reinstated in her post as a teacher for the Lower Saxony education authority. The Land government had beforehand repealed the decree on the employment of extremists in the Lower Saxony civil service (Ministerpräsidentenbeschluß - also known as the Radikalenerlaß - see paragraph 32 below) and had published regulations for dealing with "earlier cases" (see paragraph 33 below).

II. RELEVANT DOMESTIC LAW

A. The Basic Law

25. The following provisions of the Basic Law (Grundgesetz) are relevant to the instant case:

Article 5

"(1) Everyone shall have the right freely to express and disseminate his or her opinions in speech, writing and pictures and freely to obtain information from generally accessible sources. Freedom of the press and freedom of reporting on the radio and in films shall be guaranteed. There shall be no censorship.

(2) These rights shall be subject to the limitations laid down by the provisions of the general laws and by statutory provisions aimed at protecting young people and to the obligation to respect personal honour.

(3) There shall be freedom of art, science, research and teaching. Freedom of teaching shall not release citizens from their duty of loyalty to the Constitution."

Article 21

"(1) Political parties shall take part in forming the political opinion of the people. They may be freely set up. Their internal organisation must comply with democratic principles. They must render public account of the origin of their income and their assets and of their expenditure.

(2) Parties which, through their aims or the conduct of their members, seek to damage or overthrow the free democratic constitutional system or to endanger the existence of the Federal Republic of Germany shall be held to be anti-constitutional. The Federal Constitutional Court shall determine the question of anti-constitutionality.

(3) Detailed rules shall be laid down by federal laws."

Article 33

"...

(2) All Germans shall have an equal right of admission to the civil service according to their suitability, capabilities and professional qualifications.

(3) Enjoyment of civil and political rights, admission to the civil service and the rights acquired within the civil service shall not be contingent on religious belief. No one shall be placed at a disadvantage on account of his or her 'adherence or non-adherence' to a religious persuasion [Bekenntnis] or to an 'ideology' [Weltanschauung].

...

(5) The provisions governing the civil service must take into account its traditional principles."

Article 48 para. 2

"No one shall be prevented from taking office as a member of parliament or from performing the duties attaching thereto. No employment contract may be terminated and no one may be dismissed from employment on this ground."

B. Legislation governing the civil service

26. By virtue of section 7 (1) (2) of the Federal Civil Service Act (Bundesbeamtengesetz) and section 4 (1) (2) of the Civil Service (General Principles) Act (Beamtenrechtsrahmengesetz) for the Länder, appointments to the civil service are subject to the requirement that the persons concerned "satisfy the authorities that they will at all times uphold the free democratic constitutional system within the meaning of the Basic Law".

27. According to section 52 (2) of the Federal Civil Service Act and section 35 (1), third sentence, of the Civil Service (General Principles) Act for the Länder, "civil servants must by their entire conduct bear witness to the free democratic constitutional system within the meaning of the Basic Law and act to uphold it".

28. These provisions have been reproduced in the civil service legislation of the Länder, and in particular in section 61 (2) of the Lower Saxony Civil Service Act (Niedersächsisches Beamtengesetz), which likewise provides that "civil servants must by their entire conduct bear witness to the free democratic constitutional system within the meaning of the Basic Law and act to uphold it".

29. The Lower Saxony Disciplinary Code (Niedersächsische Disziplinarordnung) contains the following relevant provisions:

Article 2 para. 1

"Under this law, measures may be taken against:

(1) officials who have breached their professional duty while having the status of a civil servant ..."

Article 5 para. 1

"The disciplinary measures shall be: ... dismissal ..."

Article 11 para. 1

"Dismissal shall also entail loss of the right to a salary and of pension rights ..."

C. Decree on employment of extremists in the civil service

30. On 28 January 1972 the Federal Chancellor and the Prime Ministers of the Länder adopted the decree on employment of extremists in the civil service (Ministerpräsidentenbeschluß) (Bulletin of the Government of the Federal Republic of Germany no. 15 of 3 February 1972, p. 142), which reiterated civil servants' duty of loyalty to the free democratic constitutional system and provided as follows:

"... civil servants' membership of parties or organisations that oppose the constitutional system - and any support given to such parties or organisations - shall ... as a general rule lead to a conflict of loyalty. If this results in a breach of duty [Pflichtverstoß], it shall be for the employer to decide in each case what measures are to be taken."

31. In order to implement the decree, the Government of the Land of Lower Saxony adopted, in particular on 10 July 1972, provisions on "political activity by applicants for civil-service posts and by civil servants directed against the free democratic constitutional system".

32. Similar legislation was initially adopted in all the Länder. However, from 1979 it was no longer or only partially applied; in some Länder the relevant legislation was even repealed.

In 1990, as part of their coalition agreement on the formation of a new Government for the Land of Lower Saxony, the Social Democrat and "Green" parties decided to repeal the decree on employment of extremists in the civil service; the decree was repealed by a ministerial decision of 26 June 1990.

33. On 28 August 1990 the Land government took a number of measures relating to the treatment of "earlier cases", that is to say cases of persons who had been excluded from the civil service or refused admission to it on account of their political activities. The decision made it possible - and this happened in the present case (see paragraph 24 above) - for civil servants who had been dismissed following disciplinary proceedings to be reinstated in their posts, provided that they satisfied the recruitment and qualification requirements, without, however, entitling them to compensation or to arrears of salary.

D. Case-law on the civil service

34. In a leading case of 22 May 1975 the Federal Constitutional Court clarified the special duty of loyalty owed by German civil servants to the State and its Constitution:

"...

The tasks of a modern State administration are as varied as they are complex and they must be accomplished in an adequate, effective and prompt manner if the political and social system is to function and groups, minorities and individuals are to be able to lead a decent life. That administration must be able to count on a body of civil servants which is united and loyal, which faithfully performs its duties and is thoroughly dedicated to the State and the Constitution. If civil servants cannot be relied upon, society and State have no chance in situations of crisis.

...

It is sufficient to observe that the duty of political loyalty owed by civil servants is the core of civil servants' duty of loyalty. It does not mean a duty to identify with the

aims or a particular policy of the Government in power. It means being prepared to identify with the idea of the State which the official has to serve and with the free democratic constitutional order of that State based on the rule of law and social justice.

...

It cannot be in the interests of the State and society to have civil servants who are entirely uncritical. It is, however, essential that a civil servant approves the State - notwithstanding its defects - and the existing constitutional order as it is in force and that he or she recognises that they merit protection, bears witness to them accordingly and is active on their behalf.

...

The duty of political loyalty - loyalty to the State and to the Constitution - requires more than an attitude which while formally correct is in fact uninterested, indifferent and, at heart, distant in relation to the State and the Constitution.

It entails, inter alia, the duty for civil servants to dissociate themselves unequivocally from groups and movements that criticise, campaign against and cast aspersions on that State, its institutions and the existing constitutional system.

...

[The duty of loyalty owed by a civil servant] applies to every type of appointment in the civil service, an appointment of fixed duration, an appointment on probation and an appointment subject to revocation as well as an appointment to a permanent post. Nor can there be any difference of treatment in this respect according to the nature of the civil servant's duties.

...

The fact that the Federal Constitutional Court has not exercised its power to declare a party anti-constitutional does not mean that it is impossible to have the conviction - and to express that conviction - that the party in question pursues anti-constitutional aims and must therefore be challenged in the political arena. A party which for instance advocates in its manifesto the dictatorship of the proletariat or approves recourse to force in order to overthrow the constitutional system if the conditions are right, pursues anti-constitutional aims ...

..."

35. In judgments of 29 October 1981 and 10 May 1984 the Federal Administrative Court held that civil servants who played an active role in the DKP, for example by holding a post in the party or by standing as its candidate in elections, would be in breach of their duty of political loyalty, because they would necessarily be identifying with the anti-constitutional aims of that party. It followed the same line of reasoning in a judgment of 20 January 1987 (see paragraph 22 above).

E. Report of the Commission of Inquiry of the International Labour Office

36. In its report of 20 February 1987 the majority of the Commission of Inquiry of the International Labour Office concluded that "the measures taken in application of the duty of faithfulness to the free democratic basic order have in various respects not remained within the limits of the restrictions authorised by Article 1, paragraph 2, of [the Discrimination (Employment and Occupation)] Convention No. 111". It also formulated a number of recommendations.

In reply to this report, the German Government maintained that the measures taken to ensure that civil servants remained loyal to the Constitution were not contrary to the relevant provisions of Convention No. 111 and that in any case the recommendations made by the Commission of Inquiry were not binding on the German State for the purposes of domestic law.

PROCEEDINGS BEFORE THE COMMISSION

37. Mrs Vogt's application was lodged with the Commission on 13 February 1991. Relying on Articles 10 and 11 (art. 10, art. 11) of the Convention, and on Article 14 taken together with Article 10 (art. 14+10), she complained that her right to freedom of expression and to freedom of association had been infringed.

38. The Commission declared the application (no. 17851/91) admissible on 19 October 1992. In its report of 30 November 1993 (Article 31) (art. 31), it expressed the opinion by thirteen votes to one that there had been a violation of Articles 10 and 11 (art. 10, art. 11) of the Convention and that it was unnecessary to examine the application also under Article 14 (art. 14) of the Convention. The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[3].

FINAL SUBMISSIONS TO THE COURT

39. In their memorial the Government requested the Court to find "that in this case the Federal Republic of Germany did not violate Articles 10

[3] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 323 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

and 11 (art. 10, art. 11) of the Convention, [or] Article 14 taken together with Article 10 (art. 14+10)".

40. The applicant asked the Court

"to find that there has been a violation of Articles 10 and 11 (art. 10, art. 11) of the Convention".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10) OF THE CONVENTION

41. Mrs Vogt maintained that her dismissal from the civil service on account of her political activities as a member of the DKP had infringed her right to freedom of expression secured under Article 10 (art. 10) of the Convention, which is worded as follows:

"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 (art. 10) 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."

A. Whether there was an interference

42. The Government did not dispute the applicability of Article 10 (art. 10). However, at the hearing they requested the Court to re-examine this issue carefully.

43. The Court reiterates that the right of recruitment to the civil service was deliberately omitted from the Convention. Consequently, the refusal to appoint a person as a civil servant cannot as such provide the basis for a complaint under the Convention. This does not mean, however, that a person who has been appointed as a civil servant cannot complain on being dismissed if that dismissal violates one of his or her rights under the Convention. Civil servants do not fall outside the scope of the Convention. 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". Moreover 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 the Glasenapp and Kosiek v. Germany judgments of 28 August 1986, Series A nos. 104, p. 26, para. 49, and 105, p. 20, para. 35). Accordingly, the status of permanent civil servant that Mrs Vogt had obtained when she was appointed a secondary-school teacher did not deprive her of the protection of Article 10 (art. 10).

44. The Court considers, like the Commission, that the present case is to be distinguished from the cases of Glasenapp and Kosiek. In those cases the Court analysed the authorities' action as a refusal to grant the applicants access to the civil service on the ground that they did not possess one of the necessary qualifications. Access to the civil service had therefore been at the heart of the issue submitted to the Court, which accordingly concluded that there had been no interference with the right protected under paragraph 1 of Article 10 (art. 10-1) (see the previously cited Glasenapp and Kosiek judgments, p. 27, para. 53, and p. 21, para. 39).

Mrs Vogt, for her part, had been a permanent civil servant since February 1979. She was suspended in August 1986 and dismissed in 1987 (see paragraphs 16 and 20 above), as a disciplinary penalty, for allegedly having failed to comply with the duty owed by every civil servant to uphold the free democratic system within the meaning of the Basic Law. According to the authorities, she had by her activities on behalf of the DKP and by her refusal to dissociate herself from that party expressed views inimical to the above-mentioned system. It follows that there was indeed an interference with the exercise of the right protected by Article 10 (art. 10) of the Convention.

B. Whether the interference was justified

45. Such interference constitutes a breach of Article 10 (art. 10) unless it was "prescribed by law", pursued one or more legitimate aim or aims as defined in paragraph 2 (art. 10-2) and was "necessary in a democratic society" to attain them.

1. "Prescribed by law"

46. The Government agreed with the Commission that the interference had been based on section 61 (2) of the Lower Saxony Civil Service Act (see paragraph 28 above), as construed in the case-law of the relevant courts and had therefore been prescribed by law.

47. The applicant took the contrary view. She argued that it was in no way implicit in the duty of political loyalty required by section 61 (2) of the Lower Saxony Civil Service Act that civil servants could be dismissed, as she had been, on account of political activities. Neither the case-law nor the legislation was sufficiently clear and foreseeable on this point. As regards the case-law, the applicant sought to show that the Constitutional Court's judgment of 22 May 1975 (see paragraph 34 above) had by no means established the necessary clarity for those concerned since that judgment had been construed quite differently by the Federal Administrative Court and the Federal Labour Court. As to the legislation, the mere fact that, although the law had not been changed, she had been reinstated in 1991 (see paragraph 24 above) while still a member of the DKP showed that the formulation of the legislation was far from attaining a sufficient degree of precision. Her dismissal had in reality been based on a political decision taken by the Federal Chancellor and the Prime Ministers of the Länder in the form of the Decree of 28 January 1972 on the employment of extremists in the civil service (see paragraph 30 above).

48. The Court reiterates that the level of precision required of domestic legislation - which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed. It is moreover primarily for the national authorities to interpret and apply domestic law (see the Chorherr v. Austria judgment of 25 August 1993, Series A no. 266-B, pp. 35-36, para. 25). In this instance the Federal Constitutional Court and the Federal Administrative Court had clearly defined the duty of political loyalty imposed on all civil servants by the relevant provisions of federal legislation and the legislation of the Länder, including section 61 (2) of the Lower Saxony Civil Service Act (see paragraphs 26 to 28 above). They had held, inter alia, that any active commitment on the part of a civil servant to a political party with anti-constitutional aims such as the DKP was incompatible with that duty. At the material time - that is during the disciplinary proceedings at the latest - Mrs Vogt must have been aware of that case-law. She was therefore in a position to foresee the risks that she was running as a result of her political activities on behalf of the DKP and her refusal to dissociate herself from that party. Even if there was, as alleged, a divergence of opinion between the Federal Administrative Court and the Federal Labour Court - a divergence, moreover, whose existence the Court has not been able to establish - it would not have been material since the disciplinary courts had to follow and demonstrably followed the Federal Administrative Court's case-law. As to Mrs Vogt's argument based on her reinstatement, the latter measure does not warrant the conclusion that she seeks to draw from it, as the mere fact that a legal provision is capable of more than one construction

does not mean that it does not meet the requirement implied in the notion "prescribed by law".

The Court accordingly shares the view of the Government and the Commission that the interference was "prescribed by law".

2. Legitimate aim

49. Like the Commission, the Government were of the opinion that the interference pursued a legitimate aim. The Government contended that the restriction on the freedom of expression deriving from civil servants' duty of political loyalty was aimed at protecting national security, preventing disorder and protecting the rights of others.

50. The applicant did not express an opinion on this point.

51. The Court notes that a number of Contracting States impose a duty of discretion on their civil servants. In this case the obligation imposed on German civil servants to bear witness to and actively uphold at all times the free democratic constitutional system within the meaning of the Basic Law (see paragraphs 26-28 above) is founded on the notion that the civil service is the guarantor of the Constitution and democracy. This notion has a special importance in Germany because of that country's experience under the Weimar Republic, which, when the Federal Republic was founded after the nightmare of nazism, led to its constitution being based on the principle of a "democracy capable of defending itself" (wehrhafte Demokratie). Against this background the Court cannot but conclude that the applicant's dismissal pursued a legitimate aim within the meaning of paragraph 2 of Article 10 (art. 10-2).

3. "Necessary in a democratic society"

(a) General principles

52. The Court reiterates the basic principles laid down in its judgments concerning Article 10 (art. 10):

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. 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; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established (see the following judgments: Handyside v. the United Kingdom, 7 December 1976, Series A no. 24, p. 23, para. 49;

Lingens v. Austria, 8 July 1986, Series A no. 103, p. 26, para. 41; and Jersild v. Denmark, 23 September 1994, Series A no. 298, p. 26, para. 37).

(ii) The adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (art. 10).

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 (art. 10) the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see the Sunday Times v. the United Kingdom (no. 2) judgment of 26 November 1991, Series A no. 217, p. 29, para. 50). In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 (art. 10) and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see the above-mentioned Jersild judgment, p. 26, para. 31).

53. These principles apply also to civil servants. Although it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 (art. 10) of the Convention. It therefore falls to the Court, having regard to the circumstances of each case, to determine whether a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10 para. 2 (art. 10-2). In carrying out this review, the Court will bear in mind that whenever civil servants' right to freedom of expression is in issue the "duties and responsibilities" referred to in Article 10 para. 2 (art. 10-2) assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim.

(b) Application in the present case of the above-mentioned principles

54. According to the Government, the breadth of the margin of appreciation enjoyed by the State in the present case must be assessed with reference to the deliberate intention on the part of the Contracting States not to recognise in the Convention or its Protocols a right of recruitment to the civil service. They maintained that the conditions which a candidate for the civil service had to satisfy were closely linked to those applying to a civil servant who had already been appointed to a permanent post. The Federal Republic of Germany had a special responsibility in the fight against all forms of extremism, whether right-wing or left-wing. It was precisely for that reason and in the light of the experience of the Weimar Republic that the duty of political loyalty had been introduced for civil servants. The civil service was the cornerstone of a "democracy capable of defending itself". Its members could not therefore play an active role in parties, such as the DKP, that pursued anti-constitutional aims. Mrs Vogt had held senior posts in this party, whose objective at the material time had been the overthrow of the free democratic order in the Federal Republic of Germany and which received its instructions from the East German and Soviet communist parties. Even though no criticism had been levelled at the way she actually performed her duties, she had had, nevertheless, as a teacher, a special responsibility in the transmission of the fundamental values of democracy. Despite the warnings she had been given, the applicant had continually stepped up her activities within the DKP. That was why the German authorities had had no choice but to suspend her from her duties.

55. The applicant disputed the necessity of the interference. Since the DKP had not been banned by the Federal Constitutional Court, her activities on behalf of that party, which had been the basis of the "charges" brought against her (see paragraph 19 above), had been lawful political activities for a lawful party and could not therefore amount to a failure to fulfil her duty of political loyalty. Compliance with that obligation had to be assessed not in terms of the abstract aims of a party, but with reference to individual conduct. From this point of view she had always been beyond reproach, both in the performance of her duties, in the course of which she had never sought to indoctrinate her pupils, and outside her professional activities, where she had never made any statement that could have been considered anti-constitutional. On the contrary, her activity within the DKP reflected her desire to work for peace both inside and outside the Federal Republic of Germany and to fight neo-fascism. She was firmly convinced that she could best serve the cause of democracy and human rights by her political activities on behalf of the DKP; requiring her to renounce that conviction on the ground that the State authorities held otherwise went against the very core of the freedom to hold opinions and to express them. In any event, the imposition of the heaviest sanction had been totally disproportionate. Moreover, the very protracted nature of the disciplinary proceedings in this

case and significant differences in the way the provisions concerning civil servants' duty of political loyalty had been applied from Land to Land showed that it could not be said that there were pressing reasons for dismissing her.

56. The Commission essentially took the same view as the applicant. In its view what should have been decisive was whether the personal conduct and personal statements of the applicant were contrary to the constitutional order. Disciplinary punishment of such severity as dismissal had to be justified with reference to the personal attitude of the civil servant concerned.

57. In the present case the Court's task is to determine whether Mrs Vogt's dismissal corresponded to a "pressing social need" and whether it was "proportionate to the legitimate aim pursued". To this end, the Court will examine the circumstances of the case in the light of the situation existing in the Federal Republic of Germany at the material time.

58. Mrs Vogt became a member of the DKP in 1972. It has not been disputed that this was known to the authorities when, in 1979, even before the end of her probationary period, she was appointed a permanent civil servant. However, after investigations into her political activities, disciplinary proceedings were opened against her in 1982 (see paragraph 11 above). These proceedings were suspended several times pending further investigations, but Mrs Vogt was eventually dismissed on 15 October 1987 for breach of her duty of political loyalty. The criticisms levelled against her concerned her various political activities within the DKP, the posts she had held in that party and her candidature in the elections for the Parliament of the Land (see paragraph 19 above).

The duty of political loyalty to which German civil servants are subject, as it was defined by the Federal Constitutional Court in its judgment of 22 May 1975, entails for all civil servants the duty to dissociate themselves unequivocally from groups that attack and cast aspersions on the State and the existing constitutional system. At the material time the German courts had held - on the basis of the DKP's own official programme - that its aims were the overthrow of the social structures and the constitutional order of the Federal Republic of Germany and the establishment of a political system similar to that of the German Democratic Republic.

59. The Court proceeds on the basis that a democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded. In this connection it takes into account Germany's experience under the Weimar Republic and during the bitter period that followed the collapse of that regime up to the adoption of the Basic Law in 1949. Germany wished to avoid a repetition of those experiences by founding its new State on the idea that it should be a "democracy capable of defending itself". Nor should Germany's position in the political context of the time be forgotten. These circumstances understandably lent extra weight to this

underlying notion and to the corresponding duty of political loyalty imposed on civil servants.

Even so, the absolute nature of that duty as construed by the German courts is striking. It is owed equally by every civil servant, regardless of his or her function and rank. It implies that every civil servant, whatever his or her own opinion on the matter, must unambiguously renounce all groups and movements which the competent authorities hold to be inimical to the Constitution. It does not allow for distinctions between service and private life; the duty is always owed, in every context.

Another relevant consideration is that at the material time a similarly strict duty of loyalty does not seem to have been imposed in any other member State of the Council of Europe, whilst even within Germany the duty was not construed and implemented in the same manner throughout the country; a considerable number of Länder did not consider activities such as are in issue here incompatible with that duty.

60. However, the Court is not called upon to assess the system as such. It will accordingly concentrate on Mrs Vogt's dismissal.

In this connection it notes at the outset that there are several reasons for considering dismissal of a secondary-school teacher by way of disciplinary sanction for breach of duty to be a very severe measure. This is firstly because of the effect that such a measure has on the reputation of the person concerned and secondly because secondary-school teachers dismissed in this way lose their livelihood, at least in principle, as the disciplinary court may allow them to keep part of their salary. Finally, secondary-school teachers in this situation may find it well nigh impossible to find another job as a teacher, since in Germany teaching posts outside the civil service are scarce. Consequently, they will almost certainly be deprived of the opportunity to exercise the sole profession for which they have a calling, for which they have been trained and in which they have acquired skills and experience.

A second aspect that should be noted is that Mrs Vogt was a teacher of German and French in a secondary school, a post which did not intrinsically involve any security risks.

The risk lay in the possibility that, contrary to the special duties and responsibilities incumbent on teachers, she would take advantage of her position to indoctrinate or exert improper influence in another way on her pupils during lessons. Yet no criticism was levelled at her on this point. On the contrary, the applicant's work at school had been considered wholly satisfactory by her superiors and she was held in high regard by her pupils and their parents and also by her colleagues (see paragraph 10 above); the disciplinary courts recognised that she had always carried out her duties in a way that was beyond reproach (see paragraphs 20 and 22 above). Indeed the authorities only suspended the applicant more than four years after instituting disciplinary proceedings (see paragraphs 11 to 16 above), thereby

showing that they did not consider the need to remove the pupils from her influence to be a very pressing one.

Since teachers are figures of authority to their pupils, their special duties and responsibilities to a certain extent also apply to their activities outside school. However, there is no evidence that Mrs Vogt herself, even outside her work at school, actually made anti-constitutional statements or personally adopted an anti-constitutional stance. The only criticisms retained against her concerned her active membership of the DKP, the posts she had held in that party and her candidature in the elections for the Parliament of the Land. Mrs Vogt consistently maintained her personal conviction that these activities were compatible with upholding the principles of the German constitutional order. The disciplinary courts recognised that her conviction was genuine and sincere, while considering it to be of no legal significance (see paragraph 22 above), and indeed not even the prolonged investigations lasting several years were apparently capable of yielding any instance where Mrs Vogt had actually made specific pronouncements belying her emphatic assertion that she upheld the values of the German constitutional order.

A final consideration to be borne in mind is that the DKP had not been banned by the Federal Constitutional Court and that, consequently, the applicant's activities on its behalf were entirely lawful.

61. In the light of all the foregoing, the Court concludes that, although the reasons put forward by the Government in order to justify their interference with Mrs Vogt's right to freedom of expression are certainly relevant, they are not sufficient to establish convincingly that it was necessary in a democratic society to dismiss her. Even allowing for a certain margin of appreciation, the conclusion must be that to dismiss Mrs Vogt by way of disciplinary sanction from her post as secondary-school teacher was disproportionate to the legitimate aim pursued. There has accordingly been a violation of Article 10 (art. 10).

II. ALLEGED VIOLATION OF ARTICLE 11 (art. 11) OF THE CONVENTION

62. The applicant also complained of a breach of her right to the freedom of association guaranteed under Article 11 (art. 11) of the Convention, which is worded as follows:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of

others. This Article (art. 11) shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

A. Whether there was an interference

63. As was the case with Article 10 (art. 10), the Government did not contest the applicability of Article 11 (art. 11), although at the hearing they requested the Court to re-examine this issue carefully.

64. Notwithstanding its autonomous role and particular sphere of application, Article 11 (art. 11) must in the present case also be considered in the light of Article 10 (art. 10) (see the Young, James and Webster v. the United Kingdom judgment of 13 August 1981, Series A no. 44, p. 23, para. 57, and the Ezelin v. France judgment of 26 April 1991, Series A no. 202, p. 20, para. 37). The protection of personal opinions, secured by Article 10 (art. 10), is one of the objectives of the freedoms of assembly and association as enshrined in Article 11 (art. 11).

65. With reference to the principles set forth in respect of Article 10 (art. 10) (see paragraphs 43 and 44 above), Mrs Vogt, as a permanent civil servant, also qualified for the protection of Article 11 (art. 11).

The applicant was dismissed from her post as a civil servant for having persistently refused to dissociate herself from the DKP on the ground that in her personal opinion membership of that party was not incompatible with her duty of loyalty.

There has accordingly been an interference with the exercise of the right protected by paragraph 1 of Article 11 (art. 11-1).

B. Whether the interference was justified

66. Such interference constitutes a breach of Article 11 (art. 11) unless it satisfies the requirements of paragraph 2 (art. 11-2), which are identical to those laid down in paragraph 2 of Article 10 (art. 10-2), the only exception being where the last sentence of paragraph 2 of Article 11 (art. 11-2) is applicable.

67. In this respect the Court agrees with the Commission that the notion of "administration of the State" should be interpreted narrowly, in the light of the post held by the official concerned.

68. However, even if teachers are to be regarded as being part of the "administration of the State" for the purposes of Article 11 para. 2 (art. 11-2) - a question which the Court does not consider it necessary to determine in the instant case -, Mrs Vogt's dismissal was, for the reasons previously given in relation to Article 10 (art. 10) (see paragraphs 51 to 60 above), disproportionate to the legitimate aim pursued.

There has accordingly also been a violation of Article 11 (art. 11).

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 10 (art. 14+10)

69. Before the Commission the applicant complained of a violation of Article 14 of the Convention taken in conjunction with Article 10 (art. 14+10), but she did not raise this complaint before the Court.

70. The Court does not consider it necessary to examine the question of its own motion.

IV. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

71. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

72. Mrs Vogt submitted claims for compensation in respect of pecuniary and non-pecuniary damage and for the reimbursement of her costs and expenses.

73. The Government and the Delegate of the Commission regarded most of the sums claimed as excessive.

74. In the Court's opinion, the question is not ready for decision. It is accordingly necessary to reserve it and to fix the further procedure, account being taken of the possibility of an agreement between the respondent State and the applicant (Rule 54 paras. 1 and 4 of Rules of Court A).

FOR THESE REASONS, THE COURT

1. Holds by seventeen votes to two that Article 10 (art. 10) of the Convention is applicable in the present case;

2. Holds by ten votes to nine that there has been a violation of Article 10 (art. 10);

3. Holds unanimously that Article 11 (art. 11) of the Convention is applicable in the present case;

4. Holds by ten votes to nine that there has been a violation of Article 11 (art. 11);

5. Holds unanimously that it is not necessary to examine the case under Article 14 of the Convention taken in conjunction with Article 10 (art. 14+10);

6. Holds by seventeen votes to two that the question of the application of Article 50 (art. 50) of the Convention is not ready for decision; and

consequently,

(a) reserves the said question;

(b) invites the Government and the applicant to submit, within the forthcoming six months, their written observations on the matter and, in particular, to notify the Court of any agreement they may reach;

(c) reserves the further procedure and delegates to the President the power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 September 1995.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) joint dissenting opinion of Mr Bernhardt, Mr Gölcüklü, Mr Matscher, Mr Loizou, Mr Mifsud Bonnici, Mr Gotchev, Mr Jungwiert and Mr Kuris;

(b) supplementary dissenting opinion of Mr Gotchev;

(c) dissenting opinion of Mr Jambrek.

A statement by Mr Mifsud Bonnici is also appended.

R. R.
H. P.

JOINT DISSENTING OPINION OF JUDGES BERNHARDT, GÖLCÜKLÜ, MATSCHER, LOIZOU, MIFSUD BONNICI, GOTCHEV, JUNGWIERT AND KURIS

We are of the opinion that the disciplinary measures against Mrs Vogt, taken or approved by all the German authorities and courts concerned, do not violate Article 10 or Article 11 (art. 10, art. 11) of the Convention. Her dismissal as a teacher in public service was not only prescribed by law and ordered in pursuit of a legitimate aim; it was also proportionate and could be considered necessary in a democratic society. It falls within the margin of appreciation which must be left to the national authorities.

1. The circumstances surrounding the dismissal call, in our view, for a different emphasis from that contained in the present judgment of the Grand Chamber. Mrs Vogt had been a member of the Communist Party (DKP) since 1972, but she was nevertheless appointed to a permanent post in 1979. This can be easily explained by the German practice according to which formal membership of an extremist party is in itself in general not an obstacle to becoming or remaining a civil servant. It was only after her appointment was made permanent that Mrs Vogt intensified her activities on behalf of the DKP (see paragraphs 11-23 of the judgment). It is obvious that activities of this kind are bound to become known in a school and among the pupils even if the teacher concerned does not disseminate his or her political convictions in the classroom.

It is in our view equally beyond doubt that the programme of the DKP and the constitutional order of the Federal Republic of Germany as enshrined in the Basic Law were incompatible with each other. If a person like Mrs Vogt professes to support all the points of the DKP's programme and affirms at the same time his or her respect for the constitutional order, these assertions are equally incompatible with each other.

2. Throughout the period from the institution of the disciplinary proceedings against Mrs Vogt until her final dismissal, the DKP was supported by the communist regime and its governing party in East Germany (at the time the German Democratic Republic), and the DKP itself always considered the East German constitutional and political order to be fundamentally different from and superior to that of the Federal Republic. It can also hardly be denied that at the relevant time the East-West confrontation and the antagonism between the communist regime on the one side and the West German democratic order on the other made it necessary to strengthen the democratic order and not to allow it to be undermined.

In such a situation and bearing in mind Germany's special history, in particular the destruction of the democratic Constitution of Weimar, the State must be entitled to dismiss civil servants, including school teachers, who are actively engaged in activities on behalf of anti-democratic parties.

This must be valid for all extremist parties whether they belong to the left or the right of the political spectrum.

3. Mrs Vogt's dismissal could therefore be considered by the German authorities to be necessary in a democratic society in conformity with Articles 10 and 11 (art. 10, art. 11). The civil service is of the utmost importance in nearly all States for a proper functioning of the democratic order, and States must accordingly enjoy a considerable margin of appreciation when recruiting or dismissing public servants. States must be entitled to require their officials either to renounce their active and prominent support for an extremist party or to leave the civil service.

SUPPLEMENTARY DISSENTING OPINION OF JUDGE GOTCHEV

I voted for no violation because it is my firm opinion that Article 10 (art. 10) of the Convention was not applicable.

The judgment (paragraph 43) confirms that access to the civil service is not one of the rights protected under the Convention. However, according to the Court's case-law, if denial of access to the civil service results in a breach of some other provision of the Convention, that provision (art. 10) is applicable, so where, as in this case, the refusal of access to, or dismissal from, the civil service constitutes at the same time a violation of Article 10 (art. 10), that Article (art. 10) will be applicable.

I cannot agree with this reasoning. Mrs Vogt was not dismissed from her post as a teacher because she expressed an opinion or an idea. According to the court's decision she was in fact dismissed because of her membership of the DKP, her membership of the regional branch executive committee, being Chairperson of the local branch and her candidacy in the parliamentary election as a DKP candidate. No mention was made of any declaration or publication or any other kind of expression of opinion.

In both the cases cited in the judgment - Glasenapp and Kosiek - the dismissal was the consequence of the expression of an opinion - a letter sent by the applicant to a newspaper in the first case and two books published by the applicant in the second.

Even so in both cases our Court took the view that there had been no violation of Article 10 (art. 10).

DISSENTING OPINION OF JUDGE JAMBREK

1. I agree with the majority that both Articles 10 and 11 (art. 10, art. 11) of the Convention apply to the instant case and that there was an interference. I came to a different conclusion from the majority, however, when considering whether the impugned interference was necessary in a democratic society and whether it was proportionate to the legitimate aim pursued. As a consequence I found that the restriction was reconcilable with the respective freedoms. I also fully agree with the joint dissenting opinion of my colleagues, but wish to add to their reasoning the following points.

2. In order to strike a fair balance between the rights of Mrs Vogt and the duty of the Federal Republic of Germany at the material time to ensure that its State schools in addition to their normal functions also properly furthered the legitimate interests of national security, territorial integrity or public safety and the protection of rights of others, I will examine the circumstances of the case firstly in the light of the situation existing in the Federal Republic of Germany, and then in the light of the choices available to Mrs Vogt, in both cases at the material time.

3. The majority took account of Germany`s "bitter period that followed the collapse of" the Weimar Republic, and also its "position in the political context of the time". It also noted that "the nightmare of nazism ... led to its constitution being based on the principle of `a democracy capable of defending itself`". May I add that this constitutional principle also represented at the time material for the present case a legitimate aim justifying the duty imposed on civil servants of loyalty to the values of democracy and the rule of law.

The situation of the Federal Republic of Germany in Western Europe from 1945 to 1990 was specific and unique in comparison with other member States of the Council of Europe. It was an amputated State with a divided people, in the front line facing the countries of the former Communist Bloc. Therefore it was inevitably more vulnerable and exposed in terms of its national security, territorial integrity and public safety; in particular it was exposed to the risk of infiltration by agents and to political propaganda inimical to its constitutional order. I have no reason to doubt in this respect the facts supplied in the Government's memorial and in the oral presentation by their Agent.

Nor do I see any reason to doubt the facts provided and assessments made by the Agent of the Government as to the character and the role of the German Communist Party (DKP), of which Mrs Vogt was an active member and official. It is in my view correct to presume that this party at the material time aimed to overthrow the democratic constitutional order of the Federal Republic of Germany in order to introduce there a communist system fashioned after the model of the former German Democratic

Republic. Moreover, the DKP had the means at its disposal to implement its political goals: it was financed by its East German counterpart (SED), DKP members were trained by the SED, while about 200 members of the DKP received instruction from the SED in sabotage and terrorism; it was only in 1989 that this group was dissolved. Mr P. Becker, who spoke on the applicant's behalf, stated at the hearing that

> "It was not State repression which caused the DKP to fail to attract people but rather the collapse of the socialist regimes".

4. Mrs Vogt had been a member of the German Communist Party since 1972. She was appointed a permanent civil servant on 1 February 1979. Only subsequently, from the autumn of 1980, did she take an active role in the DKP and began engaging in the various political activities recorded in the file of the case. And on 13 June 1982 disciplinary proceedings were instituted against her on the ground that she had failed to comply with the duty of loyalty to the Constitution. On 31 October 1989 the Disciplinary Court of Lower Saxony rejected Mrs Vogt's appeal against the disciplinary sanction of dismissal imposed upon her by the Disciplinary Division of the Oldenburg Administrative Court. Thereafter various other proceedings took place and finally the Federal Constitutional Court rejected her constitutional complaint on 7 August 1990.

I refer to the above facts in order to place in their proper context the following points:

- Mrs Vogt was appointed a permanent civil servant according to the established practice that mere membership of the DKP did not constitute a breach of loyalty; - disciplinary proceedings against her were only instituted after she engaged in more prominent political activities;

- it is wrong to assume that the length of the proceedings, during which Mrs Vogt was permitted to continue teaching, indicated an absence of a "pressing social need" to halt her unconstitutional activities;

- on the contrary, the German courts made it clear that they expected her to abandon her activities within the DKP; see, inter alia, the Lower Saxony Disciplinary Court's opinion, "that a radical change in a civil servant's attitude could affect its assessment of the seriousness of professional misconduct" (paragraph 22 in fine);

- after the institution of proceedings against her, Mrs Vogt had ample time to make at least two other choices in order to meet official requirements: she could either continue with her active involvement in the DKP and seek other employment outside the German civil service, or else she could retain her job there and remain a member of the DKP while lowering the intensity of her activities in the party to the pre-1979 level.

5. The next key point is whether Mrs Vogt's dismissal (the "interference") was really necessary in the sense that it represented "a pressing social need", in view of the relationship between the way she

performed her job and her political activities. In this respect, two opposing hypotheses may be defined and defended.

According to the first, Mrs Vogt's work was apolitical and purely academic in substance and could be performed in a way that did not involve the expression of values. The distinction between professional and private (including political) life thus eliminated the danger that Mrs Vogt's political role would have such consequences for her teaching role as to justify the pressing social need to dismiss her from her job.

The German authorities gave the alternative assessment. Using a different wording, they claimed that the connection between the two roles was strong enough to justify the interference. In this respect the notion of the general "role model" of a teacher to her pupils may also be considered, the various "subtle" and "hidden" ways in which political and moral values "creep into" academic language and logic, the possibilities for extra-curricular communication between teacher and pupils, the expectation of professional loyalty to the civil service, reflected by adherence to the ethics and esprit de corps of the professional community, etc. Mrs Vogt, in her address to the Court herself stated that she always tried to communicate her fundamental beliefs

> "as a teacher and a human being. I have tried to do so within school and outside".

In my view, the picture is blurred and even in a concrete situation it is difficult to give a "yes or no answer". Therefore, I came to the conclusion that the German authorities and judges in this respect of the case were in a better position to assess whether the interference was necessary in defence of democracy, that being one of the main reasons justifying restrictions in the interests of national security, and should therefore be given a wider discretion within their margin of appreciation than that recognised by the majority.

6. The majority in the Chamber depicted the system of the duty of political loyalty to which German civil servants are subject as "absolute in nature". (Mr Trechsel, speaking on behalf of the Commission in this connection, referred to "the famous Deutsche Gründlichkeit".) This is, in my view, a distorted description, quite far from the reality revealed by the facts in the file of the present case.

Mr Becker informed the Court that only 1 to 1.5% of officially known extreme left-wing civil servants had actually been dismissed. If the system were really "absolute", then the relevant proportion would have to be approximately 100%.

Secondly, the threshold for breaching the minimal duty of loyalty was set relatively high and even then rather flexibly, to be ascertained on a case by case basis. Again, if the system were "absolute", mere membership of the DKP would probably imply a breach.

Thirdly, as the Vogt case itself indicates, the final sanction was only imposed after active and repetitious conduct classified as disloyal. It may even be inferred from the disciplinary and judicial proceedings against Mrs Vogt, that "the system" acted with great restraint. It seemed to issue a number of "advance warnings" to the accused, to the point of aiming "[to persuade] her to abandon her political activities within the DKP" (paragraph 22 in fine). Dismissal in my view was a sanction of last resort, after it became clear that all other measures were bound to fail.

Fourthly, "the system" appears flexible from the time perspective. It was changing to adapt to new political circumstances, of which one of the most dramatic was the fall of the Berlin wall: in the Land of Lower Saxony, the decree on employment of extremists in the civil service was repealed by a ministerial decision of 26 June 1990 and on 1 February 1991 the applicant was reinstated in her post as a teacher at the Lower Saxony educational authority.

And fifthly, the disputed regional differences in the implementation in my view do not testify to the "absolute" or "thorough" nature of "the system".

The misperception on the part of the majority of the nature of the disputed system and its implementation in my view seriously influenced the degree of discretion allowed to the German authorities, including the courts, in this sphere.

The majority in my view probably fell into the following fallacy: given that German authorities acted within a narrowly defined and rigid system, the application of that system in the form of interference with human rights protected under the Convention must be considered predetermined, unreasoned, and lacking the necessary discretion. Therefore, control by the European Court appears ever more desirable.

I drew the opposite conclusion from the facts of the case: "the system", as derived from the broad constitutional principle and as defined by the German Constitutional Court, rests on a broad legal doctrine and has its roots in German political history. It is also capable of responding to present-day exigencies and is implemented in a rational and flexible way. The Vogt case does not represent a departure from this approach.

7. In the Kosiek case, whose facts come closest of the Article 10 (art. 10) cases, to the present one, the applicant complained of dismissal from a lectureship - to which he had been appointed with the status of probationary civil servant - on account of his political activities for the Nationaldemokratische Partei Deutschlands (NPD) and of the content of the two books he had written; he claimed to be the victim of a breach of Article 10 (art. 10) of the Convention. In order to decide the case, the Court inquired first 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) - in the form 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.

The Court noted that one of the personal qualifications required by anyone seeking a post as a civil servant in the Federal Republic of Germany is to prove himself by being prepared to consistently uphold the free democratic system within the meaning of the Basic Law. The Court further found that "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" (Kosiek v. Germany judgment of 28 August 1986, Series A no. 105, p. 21, para. 38). The European Court noted that the Ministry dismissed him because he was "a prominent NPD official", the aims of that party "were inimical to the Constitution" and that the domestic courts had adopted essentially the same approach, and added: "It is not for the European Court to review the correctness of their findings".

The Court then decided, that "access to the civil service [lay] at the heart of the issue submitted to the Court" and for this reason found no breach of Article 10 (art. 10).

I voted in favour of the applicability of Article 10 (art. 10) in the present case, being aware that this decision implies a departure from the Court`s established case-law, inter alia, the Kosiek case. Therefore I wish by way of a concurring opinion to state that I do not agree with the majority's reason for distinguishing the cases of Glasenapp [4] and Kosiek (paragraph 44 of the present judgment), where they state that in the previous cases "the Court analysed the authorities' action as a refusal to grant the applicants access to the civil service", while Mrs Vogt was dismissed after being appointed a permanent civil servant. In addition, in the former cases the necessary qualification for access was to be prepared "to uphold the free democratic system within the meaning of the Basic Law", while the present applicant`s dismissal was a disciplinary penalty for having breached the duty owed by everyone already appointed.

The distinction is not persuasive. For the purposes of Article 10 (art. 10) the Court must answer two questions:

First, did the applicant exercise any of the freedoms protected by Article 10 para. 1 (art. 10-1) or not? In all three cases (Glasenapp, Kosiek, Vogt) the answer is affirmative.

Second, was the exercise of the said freedoms subject to any formalities, conditions, restrictions or penalties? In my view, the acts of the authorities in all three cases fall under the same heading of either a condition, restriction or penalty to which the exercise of the respective freedoms was

---

4 Glasenapp v. Germany judgment of 28 August 1986, Series A no. 104.

subjected. Mr Kosiek was dismissed from his post as a probationary civil servant, while Mrs Vogt was dismissed from her post as a permanent civil servant - for the same reasons, while it must be of no consequence for the Court that in the former case the views expressed were of the extreme right, and in the latter of the extreme left persuasion.

It would in my view be more appropriate if the Court acknowledged in a straightforward manner the change in judicial policy that occurred between the Kosiek and the Vogt cases, instead of arguing, in my view with little success, that it maintained the same principle with different results due to differences in the factual situations.

It would then be the duty of the Court to retain in the latter judgment the relevant substantive arguments of the former, at least in the modified form to fit them to the reasoning of the present case: if access to the civil service no longer "lies at the heart of the issue", then it should at least be given extra weight in the balancing exercise. And if the radical position that "it is not for the European Court to review the correctness of (the domestic courts`) findings" may no longer be maintained, than, at least their extra wide margin of appreciation should be recognised in matters of recruitment to the civil service, including access and dismissal.

8. In conclusion, I attributed different weight from that attributed by the majority to the following key ingredients in the necessity and the proportionality tests carried out in the instant case:

- specific situation of Germany in Western Europe from 1945-1990 with a divided people, facing countries of the former Communist Bloc, which made it vulnerable and exposed in terms of its national security (including defence of democratic values), territorial integrity and public safety;
- the role of the DKP as a means of infiltration and dissemination of communist propaganda in Germany;
- the applicant's active political involvement on behalf of that party from autumn 1980 onwards;
- the restrained and flexible way in which the duty of political loyalty was implemented by the German authorities;
- complicated links between private life in politics and professional life in the civil service;
- the importance of the wide margin of appreciation to be afforded to domestic courts when dealing with matters of recruitment to the civil service.

I therefore find that the disciplinary measures taken against Mrs Vogt were proportionate and could be considered necessary in a democratic society.

STATEMENT BY JUDGE MIFSUD BONNICI

I voted against finding Article 10 (art. 10) applicable in this case, but the majority took the opposite view. In my opinion only Article 11 (art. 11) is applicable. I joined the joint dissenting opinion because it covers that Article (art. 11) as well.