

The Right to Strike in the Belgian Public Sector and the Belgian Armed Forces

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About me:

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- The opinions expressed in this presentation are those of the author/speaker alone and do not necessarily represent those of the Department of Defence, the Belgian Armed Forces or any of its components.

A Short History of the Right to Strike in the Public Sector

- Private sector:
 - *1791 – 1921: **Prohibition** enforced by criminal sanctions (Le Chapelier Act , 1791; Art. 414-416, Napoleonic Criminal Code; Art. 310 Criminal Code).*
 - *1921: **Abolition of criminal penalties**, but no recognition of right to strike. Participation might have civil consequences (Act of 24 May 1921).*
 - *1967-....: **Recognition of the right to strike by the courts** (Court of Cassation, 23 November 1967, and 21 December 1981 “De Bruyne”-judgement).*
- Public Sector:
 - *1830-late 1960s/early 1970s: **Prohibition** based on the continuity principle, criminal and disciplinary sanctions (Art. 7 and 112 Royal Decree of 2 October 1937; Art. 233-235 Criminal Code; e.g. Council of State, 9 January 1964).*
 - *1970-....: **Policy of tolerance and recognition** through Int’l Law (e.g., ESC).*

The Right to Strike in the Belgian Armed Forces

- Up until 1975: no explicit statutory provision prohibiting strikes by members of the military.
- Nevertheless prohibited through the provisions on insubordination (Art 28 Military Penal Code).
- Art. 16 Military Disciplinary Regulations of 14 January 1975 ('MDR') introduces the explicit prohibition to strike.
- Currently: Art. 175 of the Act of 28 February 2007 determining the Military Statute ('MS').

Art. 175 MS

“De militairen wordt elke vorm van staking ontzegd”
« Toute forme de grève est interdite aux militaires »



Enforcement

- What constitutes a strike?
- Enforcement through both military disciplinary systems, and military criminal law:
 - Strikes impact military strength and effectiveness and are *ipso facto* related to actual service (MDR).
 - The military statute requires constant readiness, loyalty and obedience, making strikes incompatible with the military profession (MS)
 - In certain circumstances a lack of obedience becomes a criminal offence (Military Penal Code).
- While there have been several protests by soldiers (7 June 2002; 15 November 2016; 17 May 2017), strikes *sensu stricto* have not occurred in recent history.

An Evaluation of the Belgian Prohibition

- **EUROMIL v. Ireland**, ECSR (No. 112/2014, 12 September 2017):
 - "..., the Committee is called upon to resolve the question of whether a prohibition on the right to strike by members of the armed forces, as a means of pursuing a legitimate aim such as those outlined in the previous paragraph, is necessary in a democratic society. It finds that the margin of appreciation is greater than that afforded to states in respect of the police." (§116)
 - "..., the special circumstances of members of the armed forces who operate under a system of military discipline, the potential that any industrial action could disrupt operations in a way that threatens national security, there is a justification for the imposition of the absolute prohibition on the right to strike..." (§117)
 - "The Committee consequently holds that the prohibition of the right to strike of members of the armed forces does not amount to a violation of Article 6§4 of the Charter." (§118)

An Evaluation of the Belgian Prohibition

- **CGIL v. Italy**, ESCR (No. 140/2016, 22 January 2019):
 - *With regard to the public service, Article 6§4 of the Charter makes no distinction between the private and the public sector, nor any distinction between the restrictions or limitations on the rights guaranteed to the police and those guaranteed to the armed forces, as in Article 5 of the Charter. It is therefore for the Committee to give full effect to this article.*
 - *“The Committee considers that States have a wide margin of appreciation on how they may restrict the right to strike of the armed forces. For these reasons, it falls to states, within their margin of appreciation, to decide, in light of the circumstances of a given national system, whether a restriction upon the right to strike of the armed forces – with regard for example to the mode and form of collective action or to the establishment of a minimum service - is truly necessary with a view to achieving the legitimate objective pursued.” (§148)*
 - *“Measures to compensate the prohibition must be found in practice compatible with the exercise of the missions. (...) With such measures - minimum services and/or an effective procedure of negotiation or conciliation - the prohibition on the exercise of the right to strike would be proportionate.” (...) Consequently, the Committee considers that the absolute prohibition of the right to strike imposed on members of the Guardia di Finanza is not proportionate to the legitimate aim pursued and, therefore, is not necessary in a democratic society. (§152)*

An Evaluation of the Belgian Prohibition

- **Is the Belgian ban proportionate?**
 - Conditional right: prior authorization, minimum service?
 - Integrated Police: prior authorization + possibility of requisition (Art. 126 AIP).
 - Public transit, prison system
 - Feasibility for the armed forces?
 - Effective procedure of negotiation or conciliation?
 - Art. 23 Constitution: right to collective bargaining
 - A thorough exchange of views in order to reach an agreement
 - Act of 11 July 1978 organizing the relations between the public authorities and the military trade unions, and Act of 23 April 2010 temporarily executing the Act of 11 July 1978.
 - Belgian military union landscape
 - Collective bargaining in the form of **negotiation** or **consultation** on drafts of laws, royal decrees and regulations *concerning recruitment, promotion, relations with the unions, and the rights and obligations of soldiers* (Chapt. II and III).
 - **Arbitration** procedure (Chapt. IV)

An Evaluation of the Belgian Prohibition

- **Effectiveness of the negotiation or conciliation procedure**
 - “...the mechanism of collective bargaining must be such as to genuinely provide for a possibility of a negotiated outcome in favour of the workers’ side.” (EuroCOP v. Ireland, No. 83/2012, §177; EUROMIL v. Ireland, No. 112/2014, §49).
 - Principle: one sided adaptation of soldiers’ rights and duties in order to be able to adapt to demands of public interest.
 - Counterweight: Obligatory negotiation and consultation
 - *Laws*: No sanction for disregarding the procedure, due to limited jurisdiction of Constitutional Court.
 - *Royal Decrees and regulations*: substantial prerequisite supervised by the Council of State and the courts (Art. 159 Constitution).
 - In practice: fact that a measure is set as agenda item, but not actually discussed is not grounds for annulment.
 - No consensus of agreement required to conclude the negotiation.
 - A “protocol” of agreement has no binding legal value.
 - As non-committal as with other civil servants, yet no right to strike as a way to enforce an agreement.

An Evaluation of the Belgian Prohibition: Conclusion

- In the light of the most recent conclusions of the ESCR, the blanket ban on strikes in the military **might be problematic**.
- Yet, arguments against a (conditional) right to strike within the military remain valid.
- Belgian law foresees in negotiation, consultation and arbitration procedures, which *prima facie* seem to provide “*for a possibility of a negotiated outcome in favour of the workers’ side.*”
 - The unions nevertheless remain in significantly disadvantaged position vis-à-vis the government.
 - Alternative option proposed by TUTS:
 - Requisite of agreement of majority of unions (cfr. The Netherlands), but removal of automatic “representative” status of classic unions + heightened threshold for representativity.