

Legal opinion

Freedom of association

by

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within

LO-TCO

Baltic Labour Law Project
Case 136, Lithuania 36

Summary:

Lithuanian law on armed forces prohibits establishing trade unions in Lithuanian army. ILO convention 87 article 9 says that the extent to which the guarantees provided for this Convention shall apply to the armed forces and police shall be determined by national laws or regulation. To our mind this does not mean that trade unions can be prohibited in armed forces and police.

Our question is: Do ILO convention No. 87 and EU labour law allow prohibiting trade unions in armed forces and police? What is the practice in EU countries concerning trade unions in armed forces and police?

INTERNATIONAL EXPERT OPINIONS

This Lithuanian case deals with the question of the freedom of association, as in Lithuanian legislation the establishment of trade unions in armed forces is prohibited.

1) ILO

ILO Convention No.87 Freedom of Association and Protection of the Right to Organise Convention, 1948

This ILO Convention has been ratified by Lithuania on the 26th September 1994.

Article 9

“1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.”

The distinction to make under the ILO C87 is the one between members of the armed and police force and the civilian staff in the armed forces.

The Freedom of Association Committee of the Governing Body of the ILO has decided the following cases:

a) Members of the armed forces and the police

“The members of the armed forces who can be excluded from the application of Convention No. 87 should be defined in a restrictive manner.” (See 238th Report, Case No. 1279, para. 137)

“Article 9 (1) of Convention No. 87 stipulates that the “extent to which the guarantees provided for in the Convention shall apply to the armed forces and the police shall be determined by national laws or regulations”; under

this provision, it is clear that the International Labour Conference intended to leave to each State to decide on the extent to which it was desirable to grant members of the armed forces and of the police the rights covered by the Convention, which means that States have ratified the Convention are not required to grant these rights to the said categories of persons.” (See 145th Report, Case No.778, para.19; 278th Report, Case No. 1536, para.33)

“The fact that Article 9(1) of Convention No. 87 stipulates that the extent to which the guarantees provided for in the Convention shall apply to the armed forces and the police shall be determined by national laws and regulations cannot warrant the assumption that any limitations or exclusions imposed by the legislation of a State as regards the trade union rights of the armed forces and the police are contrary to the Convention; this is a matter which has been left to the discretion of the States Members of the ILO.”(See the Digest of 1985, para. 221)

“Article 2 of Convention No. 87 provides that workers and employers, without distinction whatsoever, shall have the right to establish and to join organizations of their own choosing. While Article 9 of the Convention does authorize exceptions to the scope of its provisions for the police and the armed forces, the Committee would recall that the members of the armed forces who can be excluded should be defined in a restrictive manner. Furthermore, the Committee of Experts on the Application of Conventions and Recommendations has observed that, since this Article of the Convention provides only for exceptions to the general principle, workers should be considered as civilians in case of doubt.”
(See 295th Report, Case No. 1771, para. 499)

It can be stated, that the exclusion and limitation as regards the trade union right of the armed and police force have been left under ILO C87 to the states. This means, that the states are not required to grant these rights to the above mentioned categories of workers. But nevertheless the Committee says as well, that the exclusion has to be defined in a restrictive manner.

One argument might be the wording of Article 9 of C87 as such. One could say that the guarantees themselves apply as well to the armed and the police force but that it is only a question to which extent. Still, seen the interpretation of the Committee I do not have much hope for this argument, as the extent might be stretched up to 100 %.

b) Civilian staff in the armed forces

“Civilian workers in the manufacturing establishments of the armed forces should have the right to establish organizations of their own choosing without previous authorization, in conformity with Convention No. 87.”
(See 238th Report, Case No. 1279, para. 140(a))

“The civilian staff working in the Army Bank should enjoy the right to establish and join trade union organizations, and adequate protection against acts of anti-union discrimination, in the same way as other trade union members and leaders in the country”.
(See 284th Report, Case Nos. 1588 and 1595, para. 737(a))

It is obvious, that civilian workers, cannot be treated the same way as members of the armed force and the police. The Lithuanian law needs to make a distinction here.

c) Conclusion

Seen these decisions of the Committee it can already be concluded that a general prohibition of the establishment of trade unions in the armed force and the police is not respecting the freedom of association and is therefore not in line with ILO Convention No. 87.

The Lithuanian legislation needs to differentiate between civilian workers in the armed and police force and the members.
For the first category the freedom of association under ILO C87 must be realized by giving those workers the right to establish and join trade unions just as to all other workers in Lithuania.

Unfortunately the unlawfulness of the exclusion of members of the armed force and the police from the freedom of association cannot easily be argued under ILO C87.

II) European level

At European level one has to look at the regulations coming from the Council of Europe and the European Union

1.) Revised European Social Charter

The RESC has been ratified by Lithuania the 29th June 2001 and entered into force the 1st August 2001.

Article 5 – The right to organise

“With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.”

Restrictions of the right to organise are only permitted regarding the police and the armed forces. It has to be pointed out, that the wording of Article 5 with respect to the application to the police and the army differs. Therefore a distinction is made in the interpretation of this article.

a) Police

A complete prohibition of the freedom to organise for workers in the police force is not compatible with Article 5, a limitation of this right might however be accepted.

The European Committee of Social Rights had to decide many cases on possible restrictions of the right to organise. Restrict members of the police to join or form organisations composed exclusively of their own members have been regarded as in line with the Charter.

b) Armed forces

Regarding the armed forces the statements of the Committee are of a total different nature: “... the third sentence of Art. 5 permits a state to limit in any way and even to suppress entirely the freedom to organise of members of the armed forces.”

Recent collective complaints on the matter were the following:

- (1) No. 11/2001 European Council of Police Trade Unions v. Portugal
- (2) No. 5/1999 European Federation of Employees in Public Services v. Portugal
- (3) No. 4/1999 European Federation of Employees in Public Services v. Italy
- (4) No. 2/1999 European Federation of Employees in Public Services v. France

The complaints relate to Articles 5 and 6 of the ESC. The European Committee of Social Rights alleges that the armed forces are denied these rights.

(5) No. 3/1999 European Federation of Employees in Public Services v. Greece (The complaint relates to Articles 5 and 6 of the ESC. It alleges that the armed forces are denied these rights. The European Committee of Social Rights declared the complaint inadmissible on 13 October 1999. The main argument for the inadmissibility is that Greece had not ratified articles 5 and 6 and these articles could for Greece not form the basis for any collective complaint against the country).

(for all relevant information and related documents please see:

http://www.coe.int/T/E/Human_Rights/Esc/5_Collective_complaints/List_of_collective_complaints/01List%20of%20complaints.asp#TopOfPage)

All these collective complaints did not go through, as the Committee always ruled in the way mentioned above. Only one possible point to change the interpretation of Article 5 might be with regard to workers having only a semi-military status.

c) Parliamentary Assembly Recommendation 1572 (2002)

Following these several complaints, the Parliamentary Assembly initiated a new discussion on the trade union rights in the armed forces. The final observations can be found in Recommendation 1572 (2002)

(see:

https://wcm.coe.int/rsi/common/renderers/rend_standard.jsp?DocId=52919&SecMode=1&SiteName=cm&Lang=en

<http://assembly.coe.int/documents/workingdocs/doc02/edoc9518.htm>).

The opinion of the Parliamentary Assembly on the armed forces differs from the one of the Committee in so far, as it demands for a full right to establish associations in the armed forces.

In summary the Parliamentary Assembly concluded as follows:

“ ...

3. The Assembly observes that, notwithstanding efforts to promote the civic right to association of certain professional groups, the right to organise of members of the professional staff of the armed forces is still not recognised in all member states of the Council of Europe. Furthermore, several member states that recognise the right to organise of this professional category put severe limitations on the conditions governing it.

4. In the past years, armies from certain member states converted from a conscription system to a purely professional system. As a consequence, military personnel are becoming an increasingly “regular” employee, whose employer is the Ministry of Defense, and should be fully eligible for the employees’ rights established in the European Convention on Human Rights and the European Social Charter.

5. Members of the armed forces, as “citizens in uniform”, should enjoy the full right, when the army is not in action, to establish, join and actively participate in specific associations formed to protect their professional interests within the framework of democratic institutions, while performing their service duties.
...”

But it has to be underlined, that the Parliamentary Assembly is asking for full rights regarding associations, but not trade unions.

d) Conclusion

Therefore it can be concluded, that a total prohibition of the freedom to organise for workers in the police force as in the Lithuanian legislation would be seen by the Committee as incompatible with Art.5 of the RESC, while it would be acceptable regarding the armed forces.

The Parliamentary Assembly demands a full right to establish join and actively participate in the specific associations for workers in the armed forces, but it does not go as far as to demand for the right of establishing trade unions.

2.) European Union

On the European level no regulation exists on the matter, except the freedom of association in article 12 of the Charter of fundamental rights of the European Union, but which does not have – for the moment – a legally binding character. The Charter of fundamental rights was integrated as part II in the final text of the Constitution of Europe established by the Convention and is now under discussion in IGC. So, if the new treaty will be adopted as proposed, the Charter will have legally binding force.

Furthermore it has to be considered, that in Article 137, paragraph 5 of the Treaty establishing the European Community the right of association is taken out of the scope of the Community, leaving the regulation to the Member States:

“The provisions of this article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.” Nevertheless the “Annual report on respect for human rights in the European Community 1995” issued by the European Parliament encloses a paragraph which deals with the right of association of military servicemen: The European Parliament:”... urges once more the Member States and the countries interested in joining the EU to introduce rules for the recognition of the right of association within the armed forces for both conscripts and regular service personnel;...”

III) Some information on the right of association in Europe

1.) Information by Euromil (European Organisation of Military Associations) received 29/09/2003 from Euromil

Notes "Legal aspects of the right of association" by means of some examples

(1) In Denmark the right of association for military personnel is guaranteed by the Section 85 of the Danish Constitutional Act, which states that the provisions under sections 71 (personal liberties), 78 (freedom of association) and 79 (freedom of assembly) shall be applicable to military personnel but subject to the restrictions arising from the provisions of the military laws.

The military laws limit the above constitutional provisions with respect to "processions or demonstrations in uniform against matters pertaining to military service, against armed forces in general or against Denmark's defense policy".

(2) In the Netherlands the right of association is a constitutional right (Art. 9) without any restrictions for members of the armed forces. Article 12a of the "Militaire Ambtenarenwet" (military public servants law) restricts this right to the following extend:

"1. The military servant is to abstain from public thoughts or actions - whether exercising the right of association, assembly or demonstration - if by exercising these rights the correct performance of his professional duties or the well-functioning of the public service, as far as it is related to the performance of these duties - cannot be secured within reason.

2. The first paragraph - as far as the right of association is concerned - is not applicable on the membership of
a....

b....

c... a professional association."

(3) In Germany the right of association for military personnel is guaranteed by the Constitution without restrictions for military personnel. The right of association for military personnel is determined in detail by the military law.

General:

In all three countries all further participation and consultation rights are determined by law. In the Netherlands and Denmark, these rights cover the full spectrum of trade union rights with the clear and generally accepted restriction as to the right to strike. Participation and Consultation rights in Germany are regulated by an agreement within the public service law , § 94, which makes a restriction for civil servants and military personnel with respect to the right to negotiate tariffs.

(4) In France the right of association is denied to military personnel by law. Article 10 Law 72-662 of 13 July 1972 (modified) on the general legal status of military personnel denies active servicemen found or join an organisation for the protection of their social or professional interests. The French Constitution guarantees the right of association as a fundamental right for all citizens without restrictions.

(5) In Italy the right of association is denied to military personnel by Article 3 and 8 of Law N° 382 of 11 July 1978 "Rules of Principle on Military Discipline".

Art. 3: "Soldiers are entitled to the rights that the republican constitution recognises to citizens. To guarantee the accomplishment of tasks peculiar to the Armed Forces, the law imposes limitations on soldiers in asserting some of the above rights, as well as the observance of special duties with the limits of constitutional principles.

The State arranges effective measures directed to protect and promote the development of soldiers' personality, as well as to assure them a dignified life treatment.

Art. 8: Soldiers cannot assert the right to strike, nor constitute professional associations with trade-union character, nor join other trade-union associations. Conscripts and soldiers temporarily recalled to arms can join or remain members of trade union organisations of category, but they are forbidden to carry out trade union activity when they are in situations provided for in the third clause of Article 5.

The establishment of soldiers' associations or circles is subordinate to the previous approval of the Minister of Defense.

General:

§ The right of association is a fundamental requirement / prerequisite for the establishment of social dialogue. Without it representation of the professional and social interests of employees is impossible. A well-structure social dialogue currently only takes place in those countries, which are marked with a "XX-strong position".

§ In several countries, where the right of association is legally denied to members of the armed forces, servicemen have founded associations of a cultural or other nature in an attempt to open the way for professional representation. This is e.g. the case in France, Italy, Spain, and Ukraine. In other countries the spouses of military personnel have tried to force a break-through by founding an association in protection of the professional interests of their husbands. This has in previous times been the case in Ireland and more recently in Spain.

3.) More information on specific countries

“Article 270 of the Portuguese Constitution allows for the limitation of the rights – specifically of organisation and demonstration – of members of the military and paramilitary forces, and it is under that provision that the police in question have been refused the freedom to form a union and the right to strike. Those rules are directly applicable to the paramilitary police forces, such as the Republican National Guard, whereas in the case of members of police forces with a civilian structure, such as the criminal investigation bureau, there has been no question of their rights not being recognised.”

“At present, Law No. 6/90 and Law No. 5/90, both of 20 February 1990, lay down the rights of the personnel of the municipal force and admit the possibility of forming national professional associations, though without fully applying legislation on trade union rights.”

The European Union of Police Trade Unions started a collective complaint procedure on the matter.

The Committee of the European Social Charter recalls in that case, that Article 5 permits to restrict but not to completely deny police officers the right to organise. Police personnel must, according to the Committee, be able to form and join genuine organisations for the protection of their material and moral interests and whereby such organisation must be able

to benefit from most trade union prerogatives (among others the right to assembly and speech), including the protection of their representatives.

IV) Conclusions

Regarding the question of the freedom of association in the armed forces and the police the analysed legal texts come to different results.

While Article 5 of the RESC makes a distinction between police and armed forces, Article 9 ILO C87 differentiates between military and civilian staff of those forces.

Article 9 ILO C87 accepts the total prohibition of trade unions in the armed forces for members, but not for civilian staff.

Article 5 RESC accepts the complete prohibition regarding the armed force but not for the police.

Therefore it can be concluded, that a general and complete prohibition of the freedom of association in the police is neither accepted by the RESC nor by the ILO C87. But the contrary is true for members of the armed forces.

There are several possibilities to proceed in this matter.

First on national level court proceedings could be launched, taking Article 5 RESC and Article 9 ILO C87 as arguments, seen that both instruments have been ratified by Lithuania.

Secondly on international level Lithuanian unions could comment on their governmental report to the European Committee of Social Rights regarding the implementation of Article 5 RESC or report themselves.

It should be brought forward that the general and complete prohibition of trade unions in the armed forces and the police in the Lithuanian legislation is violating Article 5 RESC and Article 9 ILO C87, that at least a distinction needs to be made between the police and the armed force and between workers with a civilian statute inside these forces.

Wiebke Düvel

Introduction

In its Recommendation 1572 (2002) 1 , the Parliamentary Assembly of the Council of Europe, referring to its own Recommendation 903(109) makes a number of proposals to ensure the effective protection of the right to organise of armed forces, including the right to collective bargaining. Apart from some rights which the Parliamentary Assembly wants to see protected it calls on the Committee of Ministers to examine the possibility of revising article 5 of the Revised Social Charter. The Committee of Ministers is under an obligation to respond to such a request and is for the moment in the process of considering its response. The group of rapporteurs on Human Rights, which will elaborate the response, wants to consult the governmental committee of the Social Charter, given its link and expertise on the RESC and article 5, to provide an opinion.

The governmental committee intends to give its opinion during its meeting session of May 2002. In order to be able as ETUC delegates on this Committee to give a comprehensive opinion, we elaborated this note for further discussion and consultation.

The opinion

In the annex we provide a proposal of opinion as drafted by the Secretariat of the Social Charter section which in no way reflects the opinion of the governmental committee and its governmental delegates as they are currently also consulting their relevant ministries on this matter.

It should be noted that the text of the Secretariat has to be considered as a mere guideline and can be amended in any way we and the other members of the Committee feel suitable.

Structure of the proposed text

§1-4: are of a mere descriptive and informative nature explaining the background of the initiative

§5: reiterates the current formulation of article 5 of the RESC

§6 contains the proposal for amendment of article 5 as suggested by the Parliamentary Assembly of the COE.

§7-10 refer in a brief and general way to the current case law on article 5, whereby it is clear that the firm objective is to ensure that the case law on the right to organise for police forces, as it stands for the moment, would also be applied to personnel of the armed forces which is not the case for the moment (§10).

§11: basically means that if the text of article 5 would be amended, all member states of the Council of Europe who have signed and ratified the current text of article 5 would have a twofold choice:

- Either they accept the amended version of article 5, including the case law relating to it for police forces which would be applied in the same way to armed forces.
- Either they reject the amended version which would mean that for them the current text of article 5 and its related case law on armed forces and polices forces remains applicable

Some tentative questions

- Do we take over some of the proposals of the Parliamentary Assembly (see §§ 5, 6 and 7 of the Recommendation) as well?
- Should we not stress in the text of the opinion that article 5 forms part of the hard core provisions of the RESC and has a long and stable interpretation
- Should we reflect this case law in the text of the opinion in order to make clear what we are actually talking about?
- How do we ensure that future interpretations are automatically form part and partial of any amended version?
- If the text would mean also the right to collective bargaining what would than be the repercussions in relation to article 6, in particular on the right to collective action.

Some information to help elaborate our opinion

1. Case law of the ECSR
2. Conclusions of the Collective Complaints n° 2-4-5/99 (Eurofedop agains respectively France, Italy and Portugal)
3. Conclusions of the Collective Complaint n° 11/2001 (European Union of Police Trade Unions versus Portugal)
4. Position of the ETUC upheld amongst others within the Governmental Committee

1. Case law of the ECSR

As early as the first supervision cycle, the Committee stated that with the exception of members of the armed forces and the police, all classes of employers and workers, including civil servants, are fully entitled to the right to organise.

However, based on the wording of the second and third sentence of article 5 together with the preparatory works on the text, limitations to the right to organise are permitted but not to deprive them of all guarantees provided for in article 5.

Regarding the police forces this would mean that complete suppression of this freedom would be incompatible with the Charter.

The Committee also notes that a distinction exists between the right to organise (article 5) and the right to bargain collectively and take collective action (article 6). The one does not imply the other according to the Committee. Hence, article 5 is not satisfied merely by the fact that a statutory or other compulsory organisation effectively engages in procedures resembling collective bargaining. (Conclusions II, p. 22)

In the third supervision cycle, the Committee reiterates its upheld distinction between armed forces and police forces. There were a complete suppression of the right to organise for armed forces is possible, this right may only be limited for the police forces on the condition that its members are not deprived from all the rights guaranteed by the article 5. In that sense the Committee considered that any legislation or regulation which forbids policemen to set up their own trade union or to join a trade union of their choice, or which obliges policemen to join a trade union imposed by statutes, are contrary to the charter because they effectively completely suppress the freedom to organise. (Conclusions III, p. 30)

Furthermore, the Committee elaborated in its subsequent case law some criteria concerning these trade union organisations whereby they had to be « actual associations » which had to be able to fulfil certain of the functions of a trade union and benefit from the basic trade union prerogatives. Amongst these prerogatives, the Committee includes the right to negotiate their conditions of service and remuneration and the right to assembly. (Conclusions X-2, p. 67, and also Conclusions XIII-3, P. 273, Portugal)

As to the restrictions, the Committee for example accepts that these associations can only be composed of members of the police force and that they are only allowed to join policemen's trade organisations.

As regards the right to strike, the Committee, again from its first supervision cycle, accepted that the right to strike for certain public servants could be restricted, thereby explicitly referring to the members of the police and armed forces.

2. Conclusions of the Collective Complaints n° 2-4-5/99 (Eurofedop against respectively France, Italy and Portugal)

In these three cases, Eurofedop alleges that the respective national laws infringe article 5 and 6 of the RESC since the members of the armed forces do not enjoy the right to organise and as it follows not the right to collective bargaining as well.

In its observations to the three cases, the ETUC referred firstly to the fundamental nature of articles 5 and 6, and secondly it holds the view that “members of the armed forces” should be interpreted in a restrictive and functional way. If thus construed, this would imply that military personnel with more technical tasks must be accorded the right to organise. Also, according to the ETUC, there is no restriction *rationae personae* in Article 6 and hence, the right to collective bargaining must in some way be guaranteed to all workers, including members of the armed forces. In addition, it needs to be checked whether any alternative form of participation guarantees a sufficient and effective participation and consultation at all levels.

The argumentation of the ECSR is in all three cases quite similar. In its assessment it always starts by reiterating that it has consistently held, based on the last sentence of article 5 of the Social Charter, that states are permitted to “limit in any way and even to suppress entirely the freedom to organise of the armed forces”. (Conclusions I, p. 31) Furthermore the ECSR observes that this provision has been included unchanged in the RESC.

As to the eventual relationship between article 5 and article 6, the Committee considers that this cannot be assessed in the abstract but needs to be considered on a concrete case-by-case basis.

Based on mainly these arguments and given the facts of the three concerned cases, the ECSC does not consider the circumstances as violating article 5 and 6/

3. Conclusions of the Collective Complaint n° 11/2001 (European Union of Police Trade Unions versus Portugal)

The European Union of Police Trade Unions alleges that Portugal is violating the Charter (article 5 and 6§2) since an act of 1990 (Act 6/90) provides only for the mere right of association and not the right to form a trade union or to bargain collectively. The ETUC in its observations agreed with this position which deprives the concerned workers of a fundamental right.

In its assessment of the case, the Committee recalls that article 5 permits to restrict but not to completely deny police officers the right to organise. Police personnel must, according to the Committee, be able to form and join genuine organisations for the protection of their material and moral interests and whereby such organisation must be able to benefit from most trade union prerogatives, including the protection of their representatives.

The Committee then describes what it understands as being basic trade union prerogatives.

- Demands with regard to working conditions and pay
- The right of access to the working place
- The right to assembly and speech (which includes the petitioning of fundamental rights protection bodies)

These prerogatives apply to the Committee to “professional organisations of the police officers as well as to other professional organisations”.

The Committee furthermore notes that there should be a protection of trade union representatives but whereby it also accepts that a 10% representativity threshold of the vote at national professional elections is acceptable under the charter.

Regarding the right to collective bargaining for police forces, the Committee reiterates that this right may be restricted by national regulations but that such officials must always retain the right to participate in any processes that are directly relevant to the determination of the procedures applicable to them.

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