Commentary


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Military-like Police Forces and Trade Union Rights

Exceptions and restrictions to workers’ freedom of association are typically controversial. Members of the military are excluded from that right in many European and non-European countries, where the right is seen as conflicting both with the duty of armed forces to ensure national security and with the principles governing the military. A growing number of countries, however, are changing their legislation to admit association (union or otherwise) to defend these interests.¹ The ban is even more intensively questioned when it affects police forces that have a military nature, because the exclusion of trade union rights derived from military status affects personnel who deliver police services equivalent to those of other police personnel. Until European Council of Police Trade Unions v France (CESP v France),² international jurisprudence had not addressed this situation.

The French National Gendarmerie is a typical such body: its members fulfill what are essentially police functions, but the State deems it a military entity.

As an armed force, the Gendarmerie had until 2015 therefore been denied freedom of association.\(^3\) Before 2015, the European Council of Police Trade Unions (CESP) submitted a complaint that followed the collective complaints protocol. CESP alleged that the military qualification of Gendarmerie personnel should not be binding for the European Committee for Social Rights (ECSR), which should qualify members according to their functions, tasks, and duties as either military or police personnel. On this basis, the CESP claims a violation of Articles 5 and 6 of the European Social Charter (the Charter) on the freedoms of association and collective bargaining, though on different grounds in each case.

The ECSR had already examined the exclusion of armed forces from trade union rights in \textit{Eurofedop v France} decision,\(^4\) that the banning was in line with Article 5. In \textit{CESP v France}, however, the Committee held that substantial legislative amendments to trade union rights justify a de novo examination of the issue—for regulations both before and after the 2015 reforms. In \textit{CESP}, the Committee shifted from its earlier \textit{Eurofedop} findings and questioned, for the first time, the effectiveness of the qualification of the Gendarmerie as either military or civil, thus establishing a distinction between police and military functions.

\textbf{Military and Police Personnel and Trade Union Rights: Restrictions Must be Proportionate and Necessary}

To evaluate compliance with Article 5, the ECSR distinguished between members of the National Gendarmerie depending on whether they carry out tasks equivalent to a police or to a military force, thus partially accepting the allegations as to the nature of Gendarmerie. In particular, the Committee found that on nearly all assignments members of the Gendarmerie perform tasks that are civilian rather than military in nature. Finally, the tasks performed by each member of the Gendarmerie will determine whether the individual qualifies as a member of the armed forces under Article 5 of the Charter. The ECSR also points out that this determination can change during a given individual’s Gendarmerie career.

\(^3\) The French National Defence Code was amended by Law No. 2015–917, admitting professional associations.