

Military trade unions in Italy and South Africa. A multilevel comparison



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Abstract: The essay deals with the legal rules on military trade unions in Italy and South Africa: the research highlights that domestic legislators have been recalcitrant to autonomously regulate the phenomena, as they have been “obliged” to comply with judgements of their constitutional courts. Both legal systems differ considerably from the pluralist model of industrial relations enshrined in the national bills of rights: military trade unions are a kind of “craft unions”, because they cannot federate themselves to confederal ones; moreover, they are deprived of the right to strike, partially compensated by arbitration mechanisms; finally, unions can engage in collective bargaining essentially in relation to wages.

Keywords: Italy - South Africa - Military unions - Special supremacy - Multilevel perspective

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SUMMARY: 1. Introduction: military unions among fundamental rights and administrative organization. - 2. International and regional sources on military unionisation: among freedoms and derogations. - 3. Italy and South Africa: the historical and constitutional rationales of labour law. - 4. Constitutional courts and the birth of military unions. - 5. The legislative frameworks: the tempered union freedom. - 6. Concluding remarks: a pattern of persistent separateness.

1. Introduction: military unions among fundamental rights and administrative organization

Under a comparative perspective, in contemporary constitutional democracies only a few countries allow the member of armed forces to form and join a trade union, and even less have extended this right to include collective bargaining. Under an industrial relations perspective this means that normally armed forces manage employee relations from a classically unitarist perspective.

Historically speaking, the unilateral option is based on the theory of special supremacy elaborated by German legal scholars in the second half of the nineteenth century (Jellinek 1912, p. 125)¹. Whether the army is prearranged to the defence of public order and internal and external security, on pain of the demise of the state as a political, territorial and sovereign entity, it is legitimate for the state itself to compress fundamental rights and freedoms in the military order. From this perspective, the military is conceived as a professional body, self-sufficient and self-contained in values, principles, institutions and relationships, even to the detriment of the dignity of the human being and it is built on the categories of honour and discipline.

Such a model is not replicable in the context of the constitutional state born with the Republic of Weimar, and then common to all European democracies as Italy after World War II, or African democracies such as South Africa after the end of racial segregation, centred on the protection of fundamental rights and freedoms *vis-à-vis* public powers and in private relations. In other words, in contemporary liberal democratic systems the military order can no longer boast the dual claim to total autonomy and institutional separateness: it must in fact be brought back within the general framework of the state order guaranteeing the fundamental rights of the individual.

Technical-legal considerations are accompanied by organizational remarks: for some scholars unionism in the Armed forces is still a taboo because

¹ In a similar vein, see (Schmitt 1935, p. 208): Armed forces are defined «a State in the State».

military prerogatives must be necessarily managed by a hierarchical chain of command with whom servicepersons must strictly comply. Moreover, concerns against military unionization deals with the threat to efficiency and the risk of unpredictable labour costs as an outcome of collective bargaining, especially after the transition from compulsory conscription to an army of professionals who voluntarily enlist².

2 International and regional sources on military unionisation: among freedoms and derogations

After this systematic premise, the current work analyses the legal framework regulating military trade unionism in the Armed forces in Italy and South Africa under a multilevel perspective, in the light of Ilo conventions, regional sources and constitutional principles. More precisely, the starting point of the research is represented by Ilo conventions no. 87 and 98, which respectively recognize and grant protection to freedom of association and right to organise, and to collective bargaining.

For members of the “security sector” the freedom is not unconditional: Ilo conventions contain special exemption clauses, specifically devoted not only to the armed forces but also to the police and, in some cases, workers in the state’s administration.

In this connection, Article 9 of Ilo Convention no. 87 leaves it open to the discretion of member states to determine the extent to which these provisions should apply to members of the armed forces: legislative discretion is bound by the principle of reasonableness, as national legislators may introduce limitations to the countervailing collective power of unions, only to protect other fundamental constitutional principles, such as public order or internal and external security. Therefore, it is abstractly possible to restrict military unionism by legislation (Golas 2022, p. 34), without excluding it at its root or entrenching itself behind the formalistic argument of the failure to adopt an act transposing the convention, denying its character as a self-executing norm: if the legislator has not intervened, the military will enjoy all the union rights granted to civilians (Mancini 1976, pp. 66-67; Mancini 1975, p. 284)³.

² For a reconstruction of the theoretical debate, see (Falsone 2022, pp. 378-384; Heinecken 2017, pp. 140-148).

³ *Contra*, (Falsone 2020): it is not clear whether international law grants national legislators to deny or not collective freedoms to members of the Armed forces.

From a systematic reading of Article 9 of the Convention, it follows that national legislators may introduce the above-mentioned limitations only on exceptional basis. Indeed, the International Covenant on economic, social and cultural rights of 1966, which is legally binding on states which, like Italy and South Africa⁴, have ratified it, allow trade union freedom to be submitted to «limits in a democratic society, in the interest of national security or public order or for the protection of the rights and freedoms of others».

In a similar vein, in the European scenario regional treaties follow the pattern of the exemption clauses: within the system of the European Council, both the European Convention on Human Rights (Echr, art. 11) and the European Social Charter (Esc, arts. 5 and 6) open to justified restrictions to a model of industrial relations in the Armed forces purely based on the autonomy of social partners. The derogation must be in concrete justified, as corroborated by the courts or bodies that have addressed the issue, respectively the European Court of Human Rights⁵ and the European Committee of Social Rights⁶.

By the contrary, the African Charter on Human and Peoples' Rights, the most significant African covenant on human rights, fully recognizes the freedom of association without stating what legal restrictions on this right are allowed (art. 10)⁷. Based on a literal interpretation of the rule, the military should enjoy the same collective freedoms as civilians.

⁴ On 12th January 2015 South Africa became the 163rd State Party to the International Covenant on Economic, Social and Cultural Rights (Icescr). Italy ratified the Covenant with Act no. 881/1977.

⁵ ECtHR, *Matelly v France*, 10609/10, 32191/2009, Judgment of 02.10.2014; ECtHR, *Adefdromil v France*, Judgement of 02.10.2014.

⁶ Ecsr, *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy*, Judgment of 11.09., complaint no. 158/2017; Ecsr, *European Organisation of Military Associations and Trade Unions (EUROMIL) v. Ireland*, Judgment of 20.10. 2020, complaint no. 164/2018, both available at www.hudoc.esc.coe.int.

⁷ The [African Charter](#) was signed in 1981 in the Gambian city of Banjul, and it has been ratified by 54 of the 55 Member States of the African Union, with the sole exception of Morocco. It entered into force in 1986. Despite the word "charter" the document is legally binding, and it establishes the African Commission on Human and Peoples Rights, organon responsible for promoting human rights within the African Union, ensuring the protection of the rights set forth in the Charter, and interpreting its content at the request of States Parties. For further information see (Amnesty International 2006; Umozurike 1983, p. 902).

3. Italy and South Africa: the historical and constitutional rationales of labour law

If we shift to the domestic jurisdictions, Italian and South African constitutions ripened in different ideological and political contexts: Italy - after more than 20 years of fascist dictatorship where all collective and individual freedoms were cancelled - came back to democracy in 1946-1948 with the end of monarchy and the entry into force of a constitution whose pillar is the protection of work (D'Antona 2002, p. 2). Such constitutional principles were concretized during the so-called “Thirty glorious of capitalism”, period of extraordinary convergence among unions and political mass parties in the enforcement of employment and labour rights and culminated in 1970 with the approval of the Workers' Statute (Treu 2016, p. 29). Instead, South Africa, for a long time Dutch and British colony, took the path of democracy in 1991 after the end of apartheid and the entry into force in 1996 of a constitution mixing civil, political and social rights on the grounds of the bill of rights born in Western Europe in the aftermath of the second world war⁸.

In any case, both domestic constitutions grant a huge protection to trade unions freedom, with independence of the sector of activity or the tasks performed by the workers. In particular, the Italian bill of rights enshrines a system of total freedom, as it states that “Trade union organization is free”: this means that the ordinary legislator cannot introduce any kind of limit to the organizational autonomy of collective bodies (Giugni 2004, p. 26). In other words, trade unions may freely choose to represent the entire working class, or just a specific economic sector or activity (i.e., the metalworker or the automobile, or public administration), or even a specific craft (e.g., teachers or train drivers).

Moreover, the model of absolute freedom of unions is strengthened by constitutional principles on political parties: indeed, under the same bill of rights the ordinary legislator may intervene on the possibility of judges, members of the diplomatic corps, policemen and members of the Armed forces to adhere to political parties (art. 98, par. 3). The systematic interpretation of the Constitution confirms the thesis that in the Italian system military unions can be part of broader collective organizations, as limits can be introduced only for the membership of political parties.

At a first glance, the South African constitutional framework on labour relations does not greatly differ from the Italian one: after the end of apartheid, the democratic Constitution of 1996 grants every worker the right to form and join a trade union; to take part to the activities of a trade union and to strike.

⁸ On the birth and ideology of South-African Constitution see (Sachs 1997, p. 669).

Moreover, every trade union has the right to determine its own programmes and activities, and to form and join a federation (art. 23)⁹.

Nonetheless, the Constitution opens to derogations to the model of integral trade unions' freedom: indeed, it allows the ordinary legislator to limit fundamental rights - including trade unions' organization and action - if the waive is reasonable and justifiable in an open and democratic society. The ordinary legislator should consider all the relevant factors including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose; and less restrictive means to achieve the purpose (art. 36). In a nutshell, South Africa follows the exemption clause approach of international law and European regional sources.

4. Constitutional courts and the birth of military unions

After the end of fascism and apartheid, Italian and South-African legislations were far closer to the European fallen right-wing dictatorial experiences (Portugal, Greece and Spain) and to the U.S. model centred on Law and Order, than to more 'mature' constitutional democracies: as early as the 1970s, albeit with different intensities, Belgium, West Germany and Scandinavians countries recognized trade union freedom to the militaries (Bologna 2022, p. 713; Brickman 1976, p. 534).

In Italy, after the end of fascism, for a long time both the jurisprudence and the different coalitional governments were recalcitrant to recognise trade unions freedom: as a palliative, since 1978 military corps were entitled to appoint representative bodies called *rappresentanze militari*, with the institutional aim to defend the interests of the troops and to dialogue with the military administration. In any case, such bodies were very far from being trade unions, as they did not have the right to engage in collective negotiations with their counterpart; and - from the point of view of the structure - they represented a public administration and not a countervailing power (Rossi 1992, p. 235): indeed, all the soldiers were obliged to take part to the elections, the colleagues elected received a remuneration for the activities performed as member of *rappresentanze*, which were considered part of the service.

Moreover, legislation enacted after the entry into force of the Constitution totally forbid militaries to strike.

⁹ For a broad description of South-African constitutional principles on trade unions' freedom after the end of apartheid see (Le Roux e Piron 2001, p. 85).

Only in 2018 the Constitutional Court recognized trade unions' freedom in the military order¹⁰: it followed the interpretive guidance of other national or supranational courts that permitted military unionization and condemned blanket bans on it. The Court based its decision not on the constitutional principles - otherwise the freedom would have been total under Art. 39 - but on the jurisprudence of the European Court of Human Rights (ECtHR), which has legitimated recently systems of separated military unions.

The Court heard referral orders challenging the constitutionality of legislation that prohibited the establishment of trade unions by members of the armed forces with reference to ECtHR case law and the Esc. In particular, the Court held that the ESC constituted international law for the purposes of Article 117(1) of the Constitution¹¹, although that the decisions of the European Committee of Social Rights do not have the same binding status as those of the ECtHR for the purposes of Italian constitutional law but are merely "authoritative". On the merits, it found that legislation prohibiting trade unions outright was incompatible with the Echr and the Esc, but that these instruments allowed for the imposition of restrictions in relation to certain special categories, such as the armed forces. In addition, since Italian constitutional law required the imposition of such limits to safeguard the cohesion of Armed forces, the Court instructed the legislator to adopt suitable legislation; moreover, it ordered those certain provisions regulating military representation bodies (*rappresentanze militari*), that had already been enacted, should apply pending the enactment of such legislation.

According to the Italian Constitutional court, the ECtHR illustrates the general principles within its own case law in this area, recalling that Article 11(1) establishes freedom of association within a trade union as a special form or aspect of the same freedom of association. In several law cases the European Court then goes on to recall that paragraph 2 of that Article does not exclude any professional category from its scope and that, regarding members of the armed forces, the police or the administration of the State, states may at most introduce "lawful restrictions", although without calling into question the right of freedom of association of their members.

10 Constitutional court, n. 120/2018, in *Gcost*, 2018, 1355, with obs. by Martire, *L'ordinamento delle Forze armate si conforma alla Convenzione europea dei diritti dell'uomo*; in *FI*, I, 2018, p. 9, with obs. by Romboli, and *ADL*, 2019, p. 114, with obs. by Pacchiana Parravicini, *Il difficile cammino delle tutele sindacali per i militari*.

¹¹ Under Art. 117 «Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations».

In addition, in the view of the European Court Member States cannot impose restrictions that touch upon the essence of freedom of association («l'essence même du droit»), without which the content of that freedom, namely the right to establish and join a trade union, would be negated given that «le droit de former un syndicat et de s'y affilier fait partie de ces éléments essentiels».

Such judgements recalled by the Constitutional Court constitute an expression of a settled position of the European Court of Human Rights, which in the *Adefdromil* and *Matelly* cases¹² reasserted the principles already set forth in the judgment of the Grand Chamber of 12 November 2008 in *Demir and Baykara v. Turkey*¹³ (concerning a trade union established by municipal officials), and subsequently referred to in the later ruling of *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain*, concerning a trade union established by police officers¹⁴. It is significant that, to ensure compliance with the *Matelly* and *Adefdromil* judgments, the French legislator adopted Law n. 2015-917, which amended the provision incompatible with the ECHR by recognising the right of military professional association in accordance with the provisions laid down in dedicated legislation.

If we shift to South-Africa, the Constitutional Court followed the same approach of the Italian one, as the judicial body drafted a model of union freedom tempered with numerous restrictions.

In the immediate post-apartheid era, ordinary legislation limited the collective rights of the militaries: members of the South African National Defence Forces (henceforth “Sandf”) could not be members of trade unions¹⁵. The Sandf never instituted *ad hoc* labour legislation until 2000, although a “Forum Structure”, similar to the Italian *rappresentanze militari*, was created in 1995 through which military personnel could channel individual and collective grievances, complaints or suggestions to higher authorities. These Forums for respective rank groups came into effect after an increase in labour unrest among soldiers and after the first South African military union, the South Africa National Defence Union (henceforth “Sand”), came into being on 26 August 1994 and announced its existence. Nonetheless, the Sandf was resolute not to recognize or negotiate with any union representing military personnel, even threatening to prosecute members for doing so.

¹² See *supra*, sub note 5.

¹³ ECtHR, *Demir and Baykara v. Turkey*, 34503/97, Judgement 12.11.2008.

¹⁴ ECtHR, *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain*, 45892/09, Judgement 21.04.2015.

¹⁵ At that time SANDF members were still governed by the Defence Act 44 of 1957.

The quest for labour rights in the military order started in 1998, when the High Court ruled that the restrictions prohibiting military personnel from belonging to trade unions were unconstitutional¹⁶. In 1999 the case was then referred to the Constitutional Court which confirmed that Section 126B of the Defence Act 44 of 1957, forbidding military personnel from joining trade unions and participating in strikes and acts of public protest, was indeed unconstitutional¹⁷.

According to the Constitutional Court, the total ban on trade unions in the Defence Act went beyond what is reasonable and justifiable in joining the legitimate state objective of a disciplined military force. In the view of the Court, it is true that Section 200(1) of the Constitution requires that the Defence Force must be structured and managed as a disciplined military force; however, this does not justify that labour relations do not develop in a constructive and orderly manner among the employer and employees.

5. The legislative frameworks: the tempered union freedom

The current rules on military trade unions in Italy are contained in Legislative decree no. 66/2010, the so-called code of the military order, emended in 2022-2023 after a parliamentary debate of four years.

Firstly, following the restrictive approach of the Constitutional court, legislation establishes that military associations can be comprised solely of military personnel and cannot join other associations, in the same way than members of the National Police¹⁸. Secondly, the establishment of a military union is subject to the prior approval of the statute by the Ministry of Defence (for members of the Armed Forces and the *Carabinieri*, national police subject to military discipline) and by the Ministry of Economics and Finance (for members of *Guardia di Finanza*, national police acting in the financial field and subject as well to military discipline). The administrative intervention is aimed at verify the military unions comply with the democratic principles enshrined in the bill of rights: the military administration will examine the organizational structure, along with the manner of its establishment and operation; and the absolute transparency of the system of financing, being forbid-

¹⁶ *South African National Defence Union v Minister of Defence* 1999 (3) BCLR 321 (T).

¹⁷ *South African National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC).

¹⁸ The Italian State Police was demilitarized in 1981 by Act no. 121: it has been a civilian-run police force ever since. Its members cannot strike and may join unions headed and formed only by members of the same State Police.

den the union to receive legacies and donations: in other words, the union can finance itself only with members' contributions.

Having regard to industrial conflict, in Italy the right to strike is considered a fundamental right, which is asserted as being immediately enforceable under Article 40 of the Constitution¹⁹ and has been recognized and always protected by courts. Nevertheless, the right to strike is forbidden for members of the military corps, and it is justified by the need to guarantee the exercise of other freedoms that are no less fundamental and to protect interests of constitutional significance²⁰. As a palliative of the strike, unions can take recourse to special conciliation and arbitration bodies.

Finally, the legislator has recognized the rights of information and consultation for the unions, and the right to collective bargaining with the public employer as a counterpart: the wideness of intervention of the collective counterpower is circumscribed to some aspects of terms and conditions of employment, essentially wages, working time, supplementary pension plans and recreational clubs. The heart of military institutions falls out of the scope of collective agreements, in line with the limitations set by the Constitutional court in 2018: military unions cannot negotiate on matters relating to the organization, training, operations, the logistical and operational sector, hierarchical and functional relations and the deployment of personnel, all fields unilaterally set by the military administration as public employer²¹.

If we analyse South Africa, in 1999 the judgement of the Constitutional Court led to the promulgation of Chapter 20 of the General Regulations to the South African National Defence Force and Reserve²², granting labour rights to members of the Sandf. The South African legislative framework does not greatly differ from the Italian one: indeed, the regulations try to strike a balance between the right to form trade unions and maintaining the disciplined character of the military, decidedly unbalanced in favour of the latter.

Members' right to form a trade union is restricted: they are also prohibited from participating in strikes and from entering into closed shop or agency shop agreements. They are also prohibited from associating with any other labour organization, association, trade union or federation that is not recog-

¹⁹ Under Art. 40 of the Constitution «The right to strike shall be exercised in compliance with the law».

²⁰ Constitutional court, n. 31/1969, in *Gcost.*, 1969, p. 898, with obs. by Onida, *Luci e ombre nella giurisprudenza costituzionale in tema di sciopero*.

²¹ See art. 1476 Legislative decree n. 66/2010.

²² See sections 87(l)(rB) and 126C of the Defense Act. For a detailed analysis, see (Chicktay 2000, p. 330).

nized or registered. Unlike Italy, neither members may affiliate with any political party or organization.

Moreover, the 1999 reform made provision for, among others, the establishment of a Military Bargaining Council (Mbc), Military Arbitration Board (Mab), and procedures to refer matters to the High Court in the case of disputes.

Having regard to collective bargaining, such a right was denied by legislation even after the 1999 Constitutional Court Judgement: only in 2007 the Constitutional Court recognized that on issues relating to the general conditions of service as identified by sectoral legislation *there is a duty to bargain*²³. The Sandf is not entitled to implement any policy unilaterally that relates to any condition of service falling within the permissible bargaining topics.

More precisely, in South Africa military trade unions may not engage in collective bargaining on matters relating to military operations, military exercises, training during military operations or exercises or the preparation for military operations or exercises or during military training (Reg. no. 40). Unions may currently negotiate on behalf of their members, only in respect of the pay, salaries and allowances of members, including the pay structure; general service benefits; general conditions of service; labour practices; and procedures for engaging in union activities within units and bases of the Defence Force (reg. no. 36).

If we follow a functionalist perspective, military trade unions are conceived at last as economic agents in the 'labour market' of defence, as their function is either to engage in negotiation with the public employer to set wages, or to intervene on working conditions in terms of information and consultation: in this connection, the Italian model seems to be more in line with the logic of fundamental rights, as since the mid of 2024 negotiations among trade unions and the Ministry of Defence are taking place for the first time after the entry into force of legislation on military unions; moreover, the ministries of Defence and Economics have recognised over thirty military unions²⁴. Instead, in South Africa military leadership prefers to manage employee relations from a classically unitarist perspective (Heinecken 2010, p. 412; Heinecken e Nell 2007, p. 483), even if the Constitutional Court granted military personnel the right to collective bargaining: since the early 2000s the only two existing military unions - the South African National Defence Force

²³ See *South African National Defence Union v Minister of Defence*, Constitutional Court case no 65/06, in <https://www.concourt.org.za/>.

²⁴ The complete list of Italian military unions is available at <https://www.difesa.it/content/associazioni-professionali-militari/index/29116.html> and at <https://www.mef.gov.it/associazioni/index.html>.

Union (Sandu) and the South African Security Force Union (Sasfu) - are not called to participate at collective bargaining²⁵.

6. Concluding remarks: a pattern of persistent separateness

After the comparative analysis, it results that Italy and South Africa have been forced to 'accept' a pluralist regulation of military terms and conditions of employment, which implies the acceptance of trade union and collective bargaining rights: legislators did not intervene autonomously, but after the judgements of the constitutional courts which opened to collective freedoms on the ground of domestic bill of rights and international and regional covenants. Legislative and jurisprudential openings are not total - i.e., the prohibitions of strike and the federation to other unions, limits to collective bargaining topics - on the grounds of internal cohesion and the principles of hierarchy and obedience outcomes of the model of special supremacy.

In addition, the practice demonstrates the difficulties when implementing the limited prerogatives of military trade unions, in a reality for a long time scared to open to collective freedoms: in South Africa the legal imposition of a pluralist model is resisted by military leadership, who continue to manage employee relations along unitarist lines. The unwillingness of the SANDF to bargain over "all matters of mutual interest" and accept the union as a legitimate bargaining entity has led to a very strained relationship with the union. As an outcome, there are still pending court battles over wages, overtime pay, and promotions.

In Italy it is too early to make a balance sheet, as sectoral legislation came into force only in 2022, and the rounds of negotiations for the first sectoral collective agreement of militaries are still taking place. In any case, legislative and administrative rules give rise to a model of craft unionism, that cannot go beyond the regulation of wages, being very limited the possibilities to, i.e., freely discuss due to the strict rules on the right to union assembly in the military premises²⁶.

To sum up, even if both countries have opened to unionization and industrial relations in the public security sector, with different intensities they continue to conceive Armed forces as a body separated from the rest of civil

²⁵ Euromil, South African Military Unionism, in www.euromil.org.

²⁶ Under art. 1480bis Legislative decree no. 66/2010 military administration may authorize meetings only and exclusively on matters falling within the union's competence, or on wages, health and safety and working times: therefore, a meeting on the compatibility between Italian military missions abroad and the pacifist principle contained in the Constitution would be unlawful, and participants would be subject to criminal liability.

society: ideologically speaking, such an option is - *mutatis mutandis* - in line with the nineteenth model of “special supremacy” of public administrations, created by law scholars and concretised within the experiences of absolute and liberal States.

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