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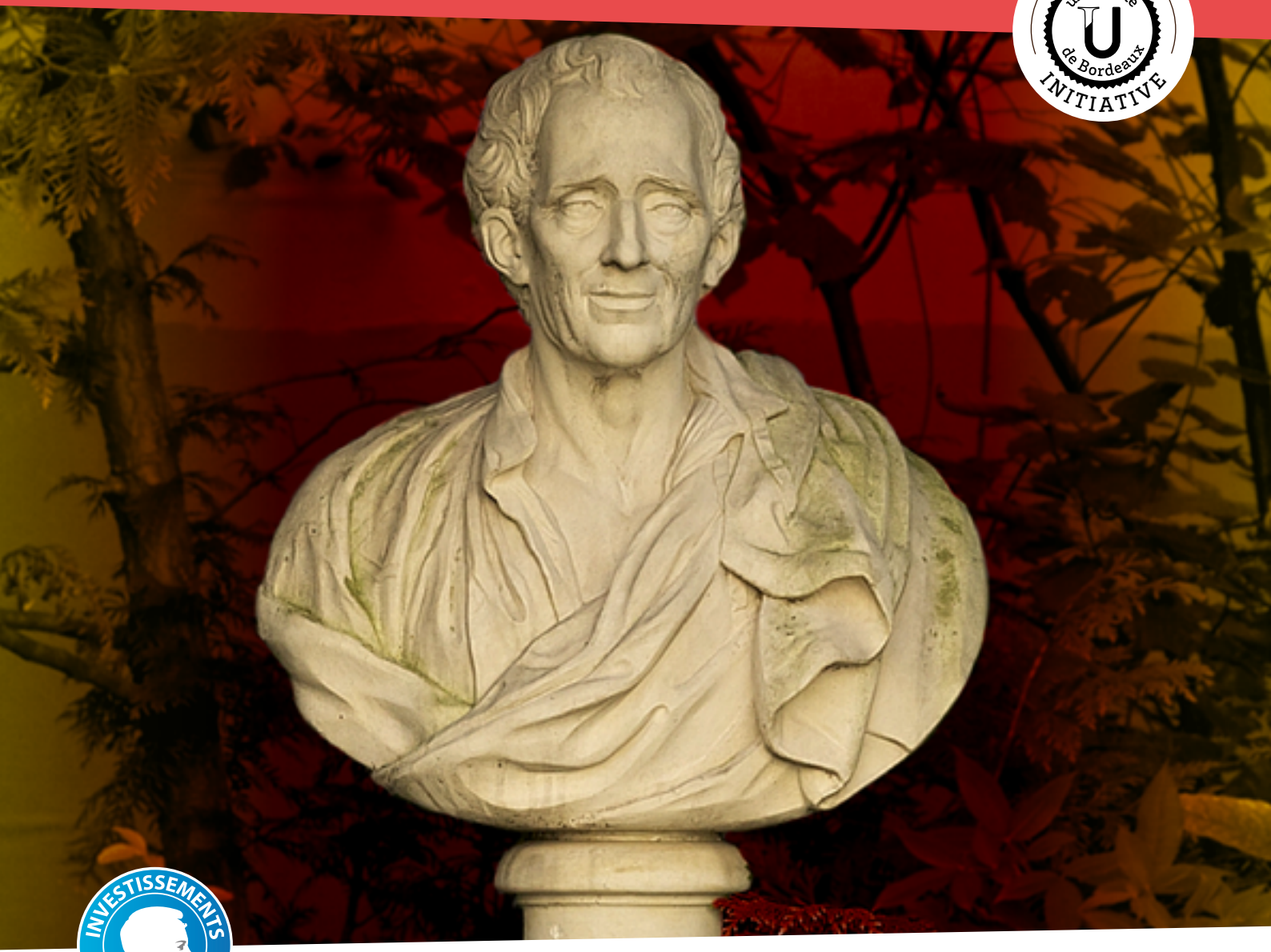

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Will the *grande muette* soon be unionised? The pitfalls of opening military law up to freedom of association

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While France is unfortunately well schooled in the condemnations handed down by the European Court of Human Rights, those delivered on 2 October 2014 by the Court in its decisions in *Adefdromil* and *Matelly* (1) had a particular impact because they go to the very heart of the French conception of the relationship between the civil and military spheres, traditionally marked by "legal cantonment" in the words of Dean Hauriou (2). Admittedly, there is nothing new in the law making its entrance on the military stage. The image of an army subject to an internal order from which the courts are excluded has been seriously shaken since the *Conseil d'Etat* restricted the scope of internal order measures in this area (3). Moreover, the 2005 reform of the general status of military personnel (4) was the opportunity to endorse, in terms of recognition of rights, the profound changes in the military profession, whose relationship with society has evolved dramatically with the professionalisation of the military and the suspension of compulsory national service in 1997. But this trivialisation of the military profession remained unfinished owing to continued restrictions, including the total ban on military personnel joining trade unions – retained in 2005 and now listed under Article L 4121-4 para. 2 of the *Code de la défense* (Defence Code) – which remained the most contested. It is precisely this highly symbolic obstacle that the ECHR has undermined.

The first matter set France against the *Association de défense des droits militaires* (Adefdromil) an association formed in 2001 and which, in the absence of military trade unions, campaigns for the protection of the rights of the military, advises personnel on their relations with the military hierarchy and supports them in the course of litigation. It was in connection with an action brought by the association for the annulment of three decrees affecting, in particular, the modalities for costs incurred in changes of residence that the *Conseil d'Etat* ruled that that it contravened those provisions of the Defence Code prohibiting military trade unions, thus rendering the action inadmissible (5). Deprived of the opportunity to bring a legal action, on the basis of the ban on military personnel joining trade unions, Adefdromil applied to the European Court of Human Rights on the grounds of infringement of Article 11 ECHR. The second case brought France up against a habitué of courtrooms, Jean-Hugues Matelly, an officer in the gendarmerie who, whilst also working as an associate researcher in the field of organisational sociology, soon clashed heads with his hierarchy. His struggle was initially focused on freedom of expression: in writing and, through his words, criticising the reforms of the gendarmerie (6), he was struck off the list of army officers by a decree of the President of the Republic; after initially being suspended (7), the decree was annulled by the *Conseil d'Etat* (8). Meanwhile the scope of Matelly's action had also expanded, as he was behind the creation in 2008 of an association, *Forum gendarme et citoyen* (Gendarme and Citizen Forum), the purpose of which was to discuss the relationships between the public and the military. The Director General of the Gendarmerie ordered Mr Matelly and other gendarmes who were members of the association to resign immediately therefrom or face sanctions. This resignation order was challenged before the *Conseil d'Etat*, which ruled in favour of the military hierarchy, asserting that the association *"has set itself*

the object, among others, to defend the material and moral situation of gendarmes" and therefore presented the characteristics of a professional association prohibited by the Defence Code (9). Having applied to the European Court of Human Rights, alleging a violation of Article 10 ECHR (10), Jean-Hugues Matelly again applied to the Court, invoking Article 11.

In both cases, the ECHR ruled in favour of the applicants and recognised that French law infringes *the very essence* of freedom of association. The media impact of these decisions has been significant especially as the ban on trade unions, so strongly reiterated by the *Conseil d'Etat* in both cases, is one of the components of the "cantoned" model specific to the French military profession. For some, the Court had opened a kind of Pandora's box leading to a questioning of the unity of the armed forces: *"by attacking the very essence of the State, [the ECHR] clearly shows its contempt for democracy and its preference for a certain conception of human rights*" (11). The finding is undoubtedly excessive since, as is pointed out by other authors, "*these two decisions are certainly not a call to revolution, but demand at the very least that French law evolve*" (12). This evolution, which has resulted in the swift amendment of the Defence Code, shows that the revolution has indeed not taken place. The freedom of association that is emerging for military personnel thanks to European law is very limited, giving the theory of "legal cantonment" a new configuration that would probably not have displeased Dean Hauriou. In order fully to grasp the issues at stake, it is a worthwhile exercise to examine the main points of this play performed in three acts.

Act 1 - French law and the ban on military personnel joining or forming trade unions

The ban is explicitly stated under Article L 4121-4 para. 2 of the Defence Code (13). The history behind the status of the military largely explains its singularity. Well before the civil service, the need to legally justify the status of military personnel appeared with the *Charte constitutionnelle* (Constitutional Charter) of 14 August 1830 (Article 69) and was amended by the Law of 19 May 1834 on the status of officers, which granted guarantees to the latter against political risks due in particular to the distinction of rank and employment. This liberal advance was however undermined by the affirmation of neutrality, prohibiting members of the armed forces from joining political or religious associations (14). The ban on joining or forming trade unions appeared all the more logical in that it also applied to civil servants, despite the acknowledgement of that right in the Waldeck-Rousseau Law of 1884 (15). The myth of *la grande muette* (literally, "the great mute"), forged in the wake of the Dreyfus affair, was confirmed by administrative case law which admitted broad restrictions on freedom of association (16) and some pieces of legislation that explicitly posited the ban on active members of the armed forces "*to be part of groups formed to support claims of a professional or political nature*" (17). In reality, the issue of military trade union associations could have been raised at the same time as the status of the civil service arising from the Law of 19 October 1946 which, in the wake of the Preamble to the 1946 Constitution, granted the right to join or form trade unions to members of the civil service. In an opinion dated 1 June 1949, the *Conseil d'Etat* nevertheless firmly maintained the ban (18), together with general disciplinary regulations, for the armed forces (19). The first general status of the military, in 1972, adopted the same position (20). The reform of the general status of the military in 2005, which was intended to adapt that status to a profoundly changed context revived the debate (21); it was, once again, a missed opportunity: the Report published by the *commission de révision du statut general des militaires* (Commission reviewing the status of members of the armed forces) stressed that "*this ban must obviously be maintained*" (22). While the 2005 reform simplified the military's

right to non-union association, it largely followed the recommendations made by the Commission by maintaining the ban (23), contained in by Article L. 4121-4 of the Defence Code since 2007.

This ban is conceived in broad terms: it applies to membership of unions as well as professional associations whereas, for the civil service, the ban on joining or forming unions prior to 1946 union ban before 1946 was offset by a certain tolerance of civil-service associations. The *Conseil d'Etat* took the opportunity to recall this point (24), also in relation to the *Association de défense des droits militaires* (Adefdromil), which could not take legal action to defend its members (25).

The justifications for the ban are mainly based on the specific requirements for the military, summarised under Article L. 4111-1 of the Defence Code (26). The duty of neutrality, loyalty or obedience would thus be incompatible with freedom of association as was forcefully emphasised by the Denoix de Saint-Marc report: "*military discipline does not accommodate the emergence of a power that more or less competes with the hierarchy. Interference in the activity of the armed forces, the questioning of unit cohesion or the availability and loyalty of military personnel, are the major risks and therefore unacceptable*" (27). These authority arguments, which form the broad basis for the theory of 'legal cantonment" and the various ups and downs in the application to the military of civil liberties governed by ordinary law emphasise *de facto* the separation between the military and the nation (28). Another argument is even more questionable: it is the factual connection, put forward by some (29), between freedom of association and the right to strike. Much of the doctrine prior to 1946 also used this connection to justify the ban on trade union activity applicable to civil servants (30). We now know that, since 1946, for some officials such as police, the ban on the right to strike is perfectly compatible with freedom of association.

The severity of the ban is, however, corrected by the establishment of consultative bodies within the military, such as the *Conseil supérieur de la fonction militaire* (Supreme Council of the armed forces) (31) and the seven *Conseils de la fonction militaire* (Military Councils) (32) on a central level; and participatory unit committees or *présidents de catégories* (elected representatives for various ranks in the armed forces) on a local level. This form of social democracy is usually put forward by supporters of the ban: the defence of collective interests, not through trade unions but rather through social dialogue (33). The criticisms levelled at the ways in which those bodies operate frequently crop up. The 2005 Law, without really answering those questions, instituted a new structure, the *Haut comité d'évaluation de la condition militaire* which, inspired by the Armed Forces' Pay Review Body (AFPRB), is tasked with informing the President of the Republic and Parliament on the situation of and developments in military life (34). It is this balance between French law banning military personnel from joining or forming trade unions on one hand and the acknowledgment of a form of social dialogue within the armed forces on the other, which was seriously shaken by the European Court of Human Rights.

Act 2 - The European law and the protection of freedom of military

The position adopted by the European Court in *Matelly* and *Adefdromil* is the result of a constructive interpretation of Article 11 ECHR, which proclaims freedom of association, "*including the right to form trade unions and to join trade unions for the protection of his interests*". Legitimate restrictions are permitted if they are prescribed by law as "*necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder (...)*", and can effectively concern "*members of the armed forces*" (Art. 11 (2)). The issue was therefore as to whether the ban under Article L. 4121-4 of the Defence Code could be considered a legitimate

restriction within the meaning of Article 11. That was the stance taken by the *Conseil d'Etat* in both *Adefdromil* (35) and *Matelly* (36). This argument was rejected outright by the ECHR, recalling that the restrictions to which Article 11 refers "*are to be strictly interpreted and should therefore be limited to the exercise of the rights in question. They must not undermine the very essence of the right to organise. Accordingly, the Court does not accept restrictions that affect the essential elements of freedom of association (...). The right to form a union and join unions is one of those essential elements*" (37). It stated that it was *"aware that the specificity of the tasks assigned to the armed forces requires adaptation of trade union activity which, by its very purpose, can reveal the existence of critical views (...)*". Therefore even significant restrictions may be imposed but they should not "*however, deprive the military and their unions from the general right of association for the defence of their professional and moral interests*" (38). Thus it is the restrictive position taken by French law that is clearly condemned here, i.e. the absolute ban on the military from joining a professional association or the ban on any military advocacy group bringing legal actions.

The principled position adopted by the Court in 2014 was not, however, firmly established. It had achieved a breakthrough in 2008 with the decision in *Demir and Baykara* (39) which, in the words of some authors, enshrined the emergence of a "*European Court of social rights*" (40), by protecting the essence of freedom of association through a progressive interpretation. It did, however, appear to be more hesitant thereafter, as shown in this case from 2013 in which it admitted a refusal by the Romanian authorities to Orthodox priests to register a trade union (41). These two decisions should be interpreted as a return to the spirit of the case law in *Demir and Baykara* (42). They both clarify some of the contradictions in European law insofar as the European Committee of Social Rights (ECSR), interpreting the European Social Charter, had considered that it was clear from the latter that States were allowed to bring "*any limitation and even to suppress entirely the freedom of association of members of the armed forces*" (43). This case law was also argued by the French Government in both cases. The Court neutralised the ECSR's position to a certain extent by removing the reference to other elements of international law.

The incompatibility of Article L. 4121-4 of the Defence Code with the ECHR is therefore established quite unambiguously. It precedes its hypothetical unconstitutionality, since the Constitutional Council, within the scope of its *question prioritaire de constitutionnalité* (QPC – priority question of constitutionality) mechanism, has not had to rule on this point. The issue of banning the freedom of association of the military in the Preamble of the 1946 Constitution nevertheless remains unresolved since, in 1949, the *Conseil d'Etat* granted a *brevet de constitutionnalité* (confirmation of compliance with the Constitution) based on the intention of the 1946 constituent authority, which had in mind the protection of workers in general, excluding the military (44). Recent Constitutional Council case law, highlighting the need to reconcile different constitutional requirements, undoubtedly elicits caution. These requirements include in particular the "*safeguard of the fundamental interests of the Nation*", which includes the independence of the Nation and territorial integrity, to which the institution of military secrets contributes (45) or the "*necessary free disposal of the armed forces*", which the exercise of electoral mandates or elective offices by active military personnel activity cannot infringe (46). More recently, it recalled that "*the principle of the necessary free disposal of the armed forces that thereby results implies that the exercise by the military of certain rights and freedoms granted to citizens is prohibited or restricted*", which led the *Conseil* to justify the *regime des fonctions des arrêts militaires* (rules governing a range of disciplinary and other offences against military law) on the grounds of the National Defence Code (47). In contrast, the European protection of the freedom of association of

military personnel would now appear to enjoy better guarantees and force French law necessarily to adapt.

Act 3 - French law and the enshrinement of a *minimum level* of freedom of association?

Following the decisions discussed above, the President of the Republic appointed Bernard Pêcheur to prepare a report on the consequences to be drawn from those condemnations, which required a change in French law (48). A number of avenues are possible. The first is restrained: in line with the Denoix de Saint-Marc Report, it would entail the development of collaborative tools within the military. This option, in accordance with historical orientations, is no longer possible as the European Court, while noting the development of these procedures, considered that "*such institutions do not replace recognition of the military's freedom of association, which includes the right to join and form trade unions*". The second option is more radical since it would lead to a profound change in the status of the armed forces: the aim would be to recognise the existence within the armed forces of trade unions within the meaning of Article L. 2121-1 of the French Labour Code and to grant them the same prerogatives. This solution, which may be based on a number of arguments, is not required by EU law: the concept of "trade union" – like that of "freedom of association" – within the meaning of Article 11 ECHR has a scope independent from national law, a functional meaning which refers to the defence of the professional interests of members through collective action. What is ultimately imposed on French law is the respect for freedom of association under European law, that is to say the possibility for the military to create and join groups aimed at protecting their rights and the acknowledgement of the right of such organisations to bring legal actions in defence of those rights. Opening this up would, moreover, undoubtedly prove difficult to justify in light of constitutional requirements (49), particularly *vis-à-vis* the "*necessary free disposal of the armed forces*", recently identified by the Constitutional Court (50).

It is a third middle way which is given precedence by French law which, in this area, is seeking a new balance. The Pêcheur Report proposes that military personnel be authorised to join national professional military associations without giving them the possibility to form trade unions. In short, it is a matter of recognising the military's freedom of association within the meaning of European law and not a right to form or join trade unions within the meaning of French law. This recommendation was quickly taken up by the legislature. The Law of 28 July 2015 updating military programming for the period 2015 to 2019 and introducing various provisions concerning defence (51) is inspired by that concept. It amends Article L 4121-4 para. 2 of the Defence Code, which now provides that: "*[t]he existence of professional military groups of a trade-union union nature and, except as provided in the following paragraph, membership of active military personnel of professional groups are incompatible with the rules of military discipline*". A new paragraph has been created: "*[t]he military can freely create a national professional military association governed by the provisions of Chapter VI of this Title; they may join such an association and exercise positions therein*". The ban on membership of trade unions is thus preserved whilst also sitting alongside the recognition of national professional military associations, governed both by the Defence Code and the Law of 1901 (or the Civil Code for Alsace-Moselle), the purpose of which is "*to preserve and promote the interests of military personnel as regards military life*" (52), defined as being "all obligations and duties pertaining to military status, together with the guarantees and compensations afforded to military personnel by the Nation" (53).

French law is thus moving towards the recognition of an *ad hoc* collection of rules on the freedom of association of military personnel, a *sui generis* trade unionism (54), at the risk of upsetting almost everyone. Trade union supporters will likely view it as a way to circumvent labour law, while the proponents of the ban may see it as a way to challenge the unity of the army. However, this minimum opening-up shows how French law is attempting to connect new rights with the army's more traditional duties. All in all, the freedom of association of military personnel illustrates a new conception of the theory of "legal cantonment", the new outlines of which have moved away from an absolute ban towards cautious recognition. Between the derogation and trivialisation of the military, French law has taken a unique path towards adaptation. It is, in fact, the beginning of a new chapter in the relationship between the armed forces and society at large.

Notes

(1) ECHR, *Matelly v France*, Application n° 10609/10, and *Adefdromil v France*, Application n° 32191/09, 2 October 2014; for French commentary, see in particular, J.-B. Auby, « Le mouvement de banalisation de la fonction militaire », *Dr. adm.* 2014, n° 12, repère 11, G. Gonzalez, « Défense du camarade syndiqué », *JCPG* 2014, n° 43, 1083, zoom, J.-P. Marguénaud et J. Mouly, « Les syndicats dans l'armée : une entrée au pas de charge ? », *JCPG* 2014, n° 48, 1228, G. Poissonnier, « La fin de l'interdiction absolue des syndicats au sein de l'armée », *D.* 2014, 2560, A. Taillefait, « Militaires : restez groupés ! », *AJDA* 2014, p. 1969, L. Burgorgue-Larsen, « Actualité de la ECHR », *AJDA* 2015, p. 150, G. Eveillard, « Chronique de droit administratif », *JCPG* 2015, n° 9, doctr. 274, L.-M. Le Rouzic, « Vers la fin du cantonnement juridique des militaires », *AJDA* 2015, p. 204, F. Sudre, « Droit de la ECHR », *JCPG* 2015, n° 3, doctr. 70, J.-Ch. Videlin, « La Cour EDH et les associations syndicales militaires », *Dr. adm.* 2015, n° 1, comm. 8, A. Zarka, « L'Europe des droits de l'Homme et la liberté syndicale des militaires », *AJFP* 2015, p. 42.

(2) Maurice Hauriou, *Précis de droit constitutionnel,* Sirey, 2nd ed. 1929, p. 111.

(3) CE Ass. 17 Feb. 1995, *Hardouin*, *RDP* 1995, p. 1338, note O. Gohin, *JCP G* 1995, II, 22426, note M. Lascombe & F. Bernard, *RFDA* 1995, p. 353, concl. Frydman, p. 822, note F. Moderne

(4) *Loi n° 2005-270 du 24 mars 2005 portant statut général des militaires* (Law n°2005-270 of 24 March 2005 on the general status of military personnel)

(5) CE 11 Dec. 2008, *Adefdromil*, *AJFP* 2009, p. 198, obs. P. B., *Constitutions* 2010, 120, obs. J. Bougrab, *AJDA* 2009, p. 148, chr. S.-J. Liéber & D. Botteghi, *Dr. adm.* 2009, comm. 42, obs. S. Damarey.

(6) See Law n° 2009-971 of 3 August 2009; see also note by O. Gohin & X. Latour, « La gendarmerie nationale, entre unité fonctionnelle et identité organique », *AJDA* 2009, p. 2270.

(7) CE ord. 29 Apr. 2010, *Matelly, AJDA* 2010, p. 927, *AJFP* 2011, p. 108, study by J. Piednoir. The *référé-liberté* (application in respect of a fundamental right or freedom) had previously been dismissed: CE ord. 30 March 2010, *Matelly, AJDA* 2010, p. 700.

(8) CE 12 Jan. 2011, *Matelly, AJDA* 2011, p. 623, note E. Aubin, *JCPG* 2011, n° 18, doctr. 537, *LPA* 3 June 2011, n° 110, p. 6.

(9) CE 26 Feb. 2010, *Matelly,* app. n° 322176.

(10) ECHR *Matelly v France,* Application n° 30330/04, 15 Sept. 2009, reported in France in *AJDA*, 2009, p. 2484.

(11) R. de Bellescize, « L'unité de l'armée française en danger », *Le Monde*, 21 Oct. 2014, www.lemonde.fr/idees/article/2014/10/21/l-unite-de-l-armee-francaise-en-danger.html

(12) J.-P. Marguénaud & J. Mouly, note cited above.

(13) Defence Code, Art. L 4121-4, para. 2 (prior to amendment): "*The existence of professional military groups of a trade union character, together with the membership of military personnel on active service of professional groups, are incompatible with the rules governing military discipline*".
(14) See circular issued by the War Minister, Marshall Soult, dated 5 July 1844.
(15) See D. Loschak, «La liberté syndicale dans la fonction publique », *Dr. ouvr.* 1978, p. 85.
(16) See in particular CE, 25 June 1920, *Taunay*, *Rec.*, p. 630.
(17) *Décret du 1er avril 1933 portant règlement du service dans l'armée* (Decree of 1 April 1933 regulating service in the Army), Art. 30.
(18) Opinion of the *Conseil d'Etat*, 1 June 1949: "*the concept of professional trade union, as arising from the legislative provisions that instituted the workers' right to form or join unions, is incompatible with the rules specific to military discipline (...). The consequence of said incompatibility is the ban on military personnel on active service from forming professional unions or joining trade union groups*".
(19) *Décret. n° 66-749 du 1er octobre 1966 portant règlement de discipline générale dans les armées* (Decree n°66-749 of 1 October 1966 regulating general discipline in the armed forces), Art. 58.
(20) *Loi n° 72-662 du 13 juillet 1972 portant statut général des militaires* (Law n°72-662 of 13 July 1972 on the general status of military personnel), Art. 10.
(21) See in particular M. D. Charlier-Degras, « Vers le droit syndical des personnels militaires ? », *RDP* 2003, p. 1073 ; L. Christian, « La liberté syndicale des personnels militaires : une vérité juridique à affirmer », *AJFP* 2005, p. 198.
(22) R. Denoix de Saint-Marc, *Rapport de la commission de révision du statut général des militaires*, Documentation française 2003, p. 9.
(23) *Loi n° 2005-270 du 24 mars 2005 portant statut général des militaires* (Law n°2005-270 of 24 March 2005 on the general status of military personnel), Art. 6.
(24) CE 26 Sept. 2007, *Rémy, app.* n° 263747.
(25) CE 11 Dec. 2008, *Adefdromil*, cited above.
(26) Defence Code, Art. L 4111-1: "*Military status requires a spirit of sacrifice at all times, going so far as the ultimate sacrifice, discipline, availability, loyalism and neutrality*".
(27) Denoix de Saint-Marc Report, cited above, p. 9.
(28) F. Baude & F. Vallée, *Droit de la défense,* ellipses 2012, p. 523.
(29) J. Robert, « Libertés publiques et défense », *RDP* 1977, p. 951.
(30) See in particular M. & A. Hauriou, *Précis de droit administratif,* Sirey 12the éd. 1933, p. 746.
(31) Law n° 69-1044 of 21 Nov. 1969; Defence Code, art. L 4124-1 *et seq*.
(32) Defence Code, Art. R 4124-6 *et seq*.
(33) See Denoix de Saint-Marc Report, cited above, p. 25.
(34) Defence Code, Art. D 4111-1.
(35) CE 11 Dec. 2008, *Adefdromil,* cited above.
(36) CE 26 Feb. 2010, *Matelly,* cited above.
(37) ECHR, *Matelly v France,* Application n° 10609/10, 2 Oct. 2014, cited above.
(38) ECHR, *Adefdromil v France,* Application n° 32191/09, 2 Oct. 2014, cited above.
(39) ECHR, *Demir and Baykara v Turkey*, Application n° 34503/97, 12 Nov. 2008.
(40) J.-P. Marguénaud & J. Mouly, « L'avènement d'une Cour européenne des droits sociaux », *D.* 2009, p. 739 *et seq*.
(41) ECHR, *Sindicatul « Pastoral Cel Bun » v Romania* Application n° 2330/09, 9 July 2013.

(42) J.-P. Marguénaud & J. Mouly, « Les syndicats dans l'armée : une entrée au pas de charge ? », cited above.
(43) ECSR, decision on the validity of Complaint 2/1999 of 4 Dec. 2000, *Fédération européenne du personnel des services publics v France*.
(44) Opinion of the *Conseil d'Etat*, 1 June 1949, cited above.
(45) Cons. const., dec. n° 2011-192 QPC, 10 Nov. 2011, *Mme Ekaterina B., épouse D. et a.*
(46) Cons. const., dec. n° 2014-432 QPC, 28 Nov. 2014, *Dominique de L.*
(47) Cons. const., dec. n° 2014-450 QPC, 27 Feb. 2015, *M. Pierre T. et a.*
(48) B. Pêcheur, *Le droit d'association professionnelle des militaires, Rapport au Président de la République,* 18 Dec. 2014.
(49) On this point, see the Pêcheur Report, cited above, p. 36.
(50) See above.
(51) Law n° 2015-917 of 28 July 2015, Art. 9 *et seq. (Chapitre III: Dispositions relatives aux associations professionnelles nationales de militaires* – Chapter III : Provisions concerning national professional military associations)
(52) Defence Code, new Art. L 4126-2.
(53) Defence Code, new Art. L 4111-1, al. 4.
(54) See L. Christian, « *La liberté syndicale des personnels militaires : une vérité juridique à affirmer* », cited above.