A right to strike is recognised in most Western advanced nations today. Greater diversity exists, however, as regards the various modalities for the exercise of this right. The member states of the European Union do not present a homogeneous picture. The focus of this article is on the peculiar features of strike law in Belgium. It is suggested that the tolerance of industrial action there may be symptomatic of a broader malaise in that country and, perhaps, Europe generally.

Litter piles up in Paris as protests go on

 Strikes continue in France with rubbish piling up in major cities and trains disrupted, despite the kick off to the [2016] Euro [soccer] championships on Friday [10 June 2016].

Jambon threatens convocation of striking police officers

 On Sunday morning [Belgian federal] Minister for the Interior Jan Jambon informed the federal police unions that he will force police officers to report for work if they refuse to step in for striking prison guards. Jambon regrets that the [on-going] strike action by prison guards leave him no alternative.

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2 Source: BELGA (Belgian News Agency), 29 May 2016 at <www.standaard.be> (English translation of the original text in Dutch) (accessed on 30 May 2016).
I INTRODUCTION

The right to strike forms a traditional and integral part of the academic discipline known as labour law. Its roots are firmly embedded in multiple international legal instruments. Most prominent, at a global level, are Convention No 87 (1948) on Freedom of Association and Protection of the Right to Organise and Convention No 98 (1949) on the Right to Organise and Collective Bargaining, both products of the International Labour Organisation (ILO). While neither Convention, strictly speaking, confers a right to take industrial action expressly, the case law of the ILO supervisory bodies leaves no room for doubt that the right to strike is to be regarded as 'inherent' to the pursuit of workers' interests. By contrast, an express reference to the right to strike can be found in art 8 of the United Nations' International Covenant on Economic, Social and Cultural Rights (1966). Similarly, at a regional – European – level, the right to strike features explicitly in art 6 of the European Social Charter (1961, revised 1996) emanating from the Council of Europe, as well as in art 28 of the Charter of Fundamental Rights of the European Union (2000). The issue for the 21st century then is not so much the existence but rather the modalities for the lawful exercise of the right to strike.

The immediate incentive for the writing of this article was a prolonged series of large-scale demonstrations and selected work stoppages among mainly public sector employees in Belgium throughout the spring of 2016 and continuing into the early summer months. Occurring in the wake of what has become known as the 22/3 terrorist attacks at the country's international airport and the capital city's subway system, the timing of the industrial action has proved most unfortunate if not, as it will be shown below, entirely coincidental. While perhaps not as widely publicised internationally as the social unrest that greeted President François Hollande's proposed labour law reforms in neighbouring France during that same period, the ultimate target of the workers' sustained campaign in Belgium similarly appears to be the national (federal, centre-right) government in its own attempts at modernising domestic labour law through increased labour market flexibility.

As a practical matter this article is structured as follows. In the first instance, a factual account of the evolving social unrest in Belgium will be given. Next follows a comparative review of the legal state of affairs as regards industrial action with


4 See generally L Swepton "International Labour Law" in R Blanpain (ed), above n 3, 141 at 152.

particular focus on the, at times, fine line between industrial and political action. In the process a number of peculiarly Belgian features of labour market policy will be drawn out. The article will conclude with some observations as regards the appropriate degree of freedom when undertaking industrial action in the 21st century.

II REVERBERATIONS OF TERROR: A FACTUAL ACCOUNT

A French Antecedents: Aux Barricades!6

The on-going opposition to the Hollande proposals for reforming French labour law has been well documented in the international press. Typical is a report published by The Independent newspaper to the effect that:7

The most concerted challenge so far to reforms in French labour law produced widespread disruption and scattered violence on Thursday [26 May 2016] but failed to bring the country, or the government, to its knees [for now].

The above UK (moderate-left) daily elaborated by stating that "[n]ewspapers, ports, power stations, trains, planes, refineries, roads and bridges were targeted by strikes or blockades organised by the hard-line [communist] Confédération Générale du Travail (CGT) union federation." Furthermore, demonstrations were said to be by no means confined to Paris and were, sadly but perhaps not untypically in recent times, "scarred by violent clashes between a fringe of anarchist and hard left protesters and the riot police".8

B Belgian Terror 1: Court Security Personnel

The social unrest in Belgium must be seen against the above backdrop. Not unlike the situation in France, labour law reform has proved difficult in Belgium due to deeply entrenched opposition to any 'attacks' on the status quo by organised labour. Like its French counterpart, the Belgian labour movement is ideologically divided. The similarities do not end there, though. Equally significant is that the terrorist attacks of 22 March 2016 on the Brussels' airport and subway system themselves occurred in the aftermath of terrorist action on French soil, the 13 November 2015 Paris shootings in particular.9 But the story behind the events that were about to unfold in Belgium starts even earlier.

6 "Aux barricades: France on Strike" The Economist, 4 June 2016, 43-44.
7 <www.independent.co.uk> (contribution by John Lichfield, Paris; accessed on 27 May 2016).
8 Ibid.
9 In an intriguing twist, the link between the terrorist events in both countries resulted in 17 families of victims from the November attacks in France contemplating proceedings in the Belgian courts against the Belgian state. French radio station RTL cited as trigger for these proceedings a critical
On 15 January 2015, a few days following the attacks in Paris on the editorial offices of satirical magazine *Charlie Hebdo*, the police and a kosher supermarket, a number of suspected terrorists were arrested following a large-scale operation by Belgian federal police in various Brussels' suburbs as well as in the otherwise sleepy Walloon town of Verviers. In Verviers the police were met with gunfire which resulted in two suspects being killed. Those arrested reportedly were members of a Belgian terror cell comprising 16 people in total, many with links to Syria. Although no formal link was established between the terrorist plot in Belgium and the previous week's attacks in Paris and while their precise target remains a mystery, the federal Minister for the Interior, Jan Jambon, indicated in a BBC interview that plans existed for the decapitation of police officers which was to be filmed on webcam and the images subsequently distributed across the globe.10

A date for the trial of the alleged terrorists was set for 9 May 2016. Three full weeks were set aside for the trial, with the first week dedicated to the interrogation of the terror suspects and two further weeks reserved for the pleadings of the federal prosecutor and the defence. In a bizarre twist, the presiding judge of the Brussels criminal trial court (tribunal correctionnel) felt obliged to suspend proceedings on the first day at 3:30 pm because the court’s own security personnel – responsible, among other things, for transporting detainees from the court room to the prison – refused to work beyond 4 pm. While arguably in conformity with a strict reading of their employment conditions, the action by the security officers certainly was 'spontaneous' in that it came without much prior notice. Apart from any inconvenience thus created, by selecting a high-profile trial for their action,11 the court security personnel succeeded in giving maximum publicity to an underlying, and lingering, dispute about employment conditions generally.12

**C Belgian Terror 2: Brussels Airport Police**

In the wake of the 2016 terrorist attack on Brussels airport questions were inevitably asked about the manner in which airport security had been handled. In principle, the same rules apply across all European airports as airport security is

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11 The prosecution asked for prison sentences varying between 15 and 18 years for the suspected ring leaders. In a decision issued on 5 July 2016, the criminal court of first instance imposed 15 prison sentences varying between 30 months and 16 years.

regulated at a European rather than a purely national level. This does not prevent local issues from coming into play, though. Thus, security personnel at Brussels airport objected to being singled out for special public criticism in the aftermath of the 22/3 attacks. This in turn affected the timetable for the reopening of the airport. Specifically, the police union threatened strike action unless security measures at Zaventem were stepped up considerably. A special point of contention proved to be a union demand that all passengers and visitors be screened prior to entering the airport building. Eight days after the terror attack members of the airport police sent an 'open letter' to their (federal government) employer in which they expressed their frustration with the inadequate management of airport security in the lead-up to the 22/3 attacks. The open letter deplored the 'abominable' infrastructure, the 'outdated' weaponry, and the 'questionable' system for dealing with lost or unaccompanied luggage. Specific reference was made in the letter to the risks associated with the employment of baggage handlers with a criminal record. The latter concern had particular resonance since one of the terror suspects was later shown to have been employed, albeit several years prior to the 22/3 attacks, as a cleaner at the European Parliament.

An agreement with the airport police allowed the first (highly symbolic) passenger flight to depart from a partially reopened Brussels airport on 3 April 2016. But the underlying problem remains. Appearing before a parliamentary commission of inquiry set up in the aftermath of the 22/3 attacks, airport police Chief Commissioner Guy Cordeel testified that an increase in personnel by 50% is called for in order to deal with increased work pressures due to, not just the on-going threat of terrorist action but also a 25% increase in air passengers over a period of five years while personnel numbers have remained at 2010 levels, together with rising numbers of expulsions for undocumented arrivals and an ever increasing number of EU Summits being held in the capital city.

13 At EU level the European Commission has laid down common rules aimed at protecting persons and goods from unlawful interference with civil aircraft since 2002. Initial framework Regulation 2320/2002 has since been replaced by framework Regulation (EC) 300/2008: OJ L97/72, 9.4.2008.
14 Minister for Justice Koen Geens and Minister for the Interior Jan Jambon also offered their resignation in the wake of the 22/3 attacks which was promptly refused by Prime Minister Charles Michel.
15 Chief Commissioner Cordeel drew parallels with Amsterdam and Madrid airports. Schiphol, while handling 2.5 times the number of passengers at Zaventem, employs 1,800 security personnel as compared to barely 400 at the Brussels airport. At Madrid personnel numbers were said to be in excess of 2,000: see "Luchthavenpolitie na aanslagen: We zitten op ons tandvlees" ["Airport police post attacks: We are running on empty"] in Het Nieuwsblad 23 May 2016: <www.nieuwsblad.be> (accessed on 24 May 2016).
A full reopening of the international airport at Brussels did not occur until 2 June 2016, just in time for the start of the European summer holiday season. The announcement of its scheduled reopening on that date immediately lost some of its lustre, though, when regional airport police at Charleroi ('Brussels South') decided to take industrial action in the form of a 'go-slow' on 1 June. It was followed by a joint union announcement of a further, second work-to-rule action at the Brussels South airport on 9 June 2016. By way of clarification it must be noted that prior to the international airport becoming fully operational again, staff at regional airports in both Flanders (Antwerp and Ostend) and Wallonia (Liège and Charleroi) had been left to bear the brunt of many a rescheduled flight.

**D Prison Personnel**

Federal government plans to revamp the employment conditions of prison guards triggered strike action in Brussels and Wallonia commencing on 25 April 2016. The industrial action continued for some five weeks, notwithstanding direct negotiations between the federal Minister for Justice, (Leuven Professor) Koen Geens, and the leaders of the various unions involved in the dispute. The division of the Belgian union movement along both ideological and linguistic lines proved particularly problematic when the Christian and socialist (but not the liberal) unions of the French-speaking part of the country refused to sign off on a deal struck in late May.

In the result a number of strikers employed in prisons located in Wallonia and Brussels switched unions by resigning from their French-liberal (conservative) union and joining instead its Christian or socialist counterpart. To some extent their move was driven by financial considerations: members of a union that had signed the agreement were thereafter no longer able to continue their strike action with wages lost due to industrial action compensated through the union strike fund. But, in addition, the disillusionment among the rank and file with their union for 'having sold out' by signing the (inevitably compromise) settlement proved particularly strong.

One week after four of the six prison unions signed the deal brokered by the Minister for Justice, the French-socialist union CGSP-AMiO and the French-Christian union CSC submitted a counter-proposal while continuing their industrial action in prisons of Brussels and Wallonia. The reaction from the Prime Minister was both swift and negative: drawing attention to the consideration that the Minister

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16 "Politie plant stiptheidsacties op luchthaven Charleroi" ["Police plans work-to-rule actions at Charleroi airport"] in De Standaard, 8 June 2016: <www.standaard.be> (accessed on 9 June 2016).

17 No official figures exist but union membership of Belgian employees has been consistently high, certainly much higher than in neighbouring France or Germany.
for Justice personally previously had met with the various prison unions on no fewer than 12 occasions in a single month, the time for negotiations was said to be well and truly over.  

By the middle of June 2016 the continued industrial action in 11 prisons, all located in the regions of Brussels and Wallonia, passed the 50 days' mark. In searching for an explanation as regards the hard-line attitude of workers and their unions in the French-speaking part of Belgium, some academic commentators have suggested that organised labour in the southern part of the country displays a somewhat anarchist, protest-for-the-sake-of-protest mentality. Be that as it may, the available data shows that a north-south divide of sorts exists in Belgium. In particular, nearly one in five Walloon children is being raised in a family where both parents are unemployed as compared to one in 15 children in Flanders. Only Brussels, with a quarter of children living in families where neither parent works, presents an even gloomier picture. The job market participation rate, capturing the percentage of 15-64 year olds either in employment or actively looking for employment, presents an even starker contrast between Wallonia and the rest of the country: 64.2% in Wallonia as compared to 66.6% in Brussels and 69.9% for Flanders. Among European Union member states only Italy, with a participation rate of 63.9%, performs worse than Wallonia. In terms of ideological union affiliation of employees, the social election results for 2016 show that, with 55.28% of the votes for employee representatives on works councils, the Christian union (ACV) remains the largest. While the ACV also dominates in Wallonia (at 47.78%), the socialist union ABVV clearly is more representative in Wallonia (at 42.55%) than in Flanders (at 31.19%). The conservative ACLVB union occupies third place throughout the

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18 "Michel reageert op tegenvoorstel Franstalige cipiersbonden: <De onderhandelingen zijn afgelopen>" ("Michel reacts to counter proposal by French prison unions: <Negotiations have concluded>") in Het Belang van Limburg, 8 June 2016 <http://hbvl.be> (accessed on 9 June 2016).

19 "Na vijftig dagen blijft staking duren in elf gevangenissen" ["On-going strikes pass 50 day mark in 11 prisons"] in De Standaard, 14 June 2016 <www.standaard.be> (accessed on 15 June 2016).

20 Pascal Delwit, Professor of Political Science, Université Libre de Bruxelles "Links-radical PTB zoekt de macht op straat" ["Radical-Left Parti du Travail de Belgique seeks to dominate on the streets"] in De Morgen 1 June 2016 <www.demorgen.be> (accessed on 2 June 2016).

country, but it performs noticeably worse in Wallonia (at 8.05% of the total vote) than in Flanders (at 12.46%).

The prolonged industrial action by prison guards has triggered various side effects. As the strikes inevitably impacted on the conditions under which the inmates themselves were being housed, investigating judges (onderzoeksrechters; juges d'instruction) in the Brussels region released some 10 suspects (including, reportedly, at least one drug trafficker) from pre-trial detention because prison conditions (at Vorst and Saint Gilles, in particular) were deemed 'inhuman'. In the same vein, and at the request of several prison directors, the Federal Minister of Justice granted some 200 prisoners deemed low-risk 'exceptional' penitentiary leave for an initial period of 14 days on humanitarian grounds.

Concern about the guarantee of a minimum 'service' for detainees during periods of industrial action predate the social unrest of 2016. In fact, the matter has been the subject of talks since 2014. To ensure the presence of at least some guards in prisons affected by industrial action in the 2016 dispute, army personnel had to be called upon and, furthermore, the federal Minister for the Interior felt compelled to give official notice to the effect that any 'work-shy' members of the police force also would be compulsorily called upon on grounds of public order and security. Neither measure prevented several hundred inmates from bringing (successful) court proceedings against the Belgian state for failing to ensure compliance with the statutory minimum rights of detainees. The court action sought to enforce, on pain of a substantial (up to 1,000 euro per prisoner) daily penalty payment (dwangsom; astreinte), the entitlement of detainees to, among other things, three meals (of which one must be freshly cooked) each day and at normal intervals. Inmates also must get an opportunity to shower and have access to a telephone every other day, visiting rights twice a week, and the ability to leave their cell to stretch their legs in outside air for one hour daily. Furthermore, prisoners are entitled to a regular change of clothing and can expect to have their cells cleaned.

A new document listing the fundamental rights of prisoners during periods of prolonged industrial action is currently on the negotiating table. In addition, the Minister for Justice is prepared to boost prison personnel by several hundreds. On this basis Belgian prisons are anticipated to have 7,075 prison personnel from mid-2017 onwards. Existing prisons are in need of upgrading and new prisons need to be

22 Provisional data released by the Belgian federal government at <www.werk.belgie.be> (Federale Overheidsdienst Werkgelegenheid, Arbeid en Sociaal Overleg) (accessed on 9 June 2016).

added. At present Belgian prisons hold some 11,000 prisoners at an (unenviable) average density of 134.2 prisoners for every 100 cells.\textsuperscript{24} Not quite 50% of inmates are non-Belgians comprising, astonishingly, some 130 different nationalities.\textsuperscript{25}

\section*{E Public Transport (National Rail) Workers}

It will be clear from the above account that the terrorist threat weighs heavily on a small country like Belgium. A report prepared by the College of Public Prosecutors in the aftermath of the attacks on the Brussels' airport and subway system draws special attention to the pressure on the department of justice and the security services since both face "criminality that knows no country boundaries and has ever greater technological and financial means at its disposal".\textsuperscript{26} A sore point, of long standing, in this regard is the dated infrastructure, including computer and information technology, within the court system.

At a political level, the federal government of Charles Michel is showing the strain of the relentless nature of the task ahead. Thus, in response to leaks to the press that several key ministers are receiving extra protection because of renewed security threats directed at their person and families, the government is preparing draft legislation that seeks to double the criminal penalties for breaches of existing confidentiality laws.\textsuperscript{27} But tackling terrorism is by no means its only headache. Social unrest about attempts to wind back 'acquired' employee rights in the public transport sector is proving a new distraction of more than mere passing concern.

It started on 25 May 2016 with an unofficial strike, without notice, by National Rail (NMBS) personnel in Charleroi to the south of Brussels. This 'wildcat' action, since recognised by the union organisation, quickly escalated and extended throughout Wallonia. A particular (if, to an outside observer, somewhat bizarre) sticking point concerned a government plan to recalculate employee entitlements to so-called credit days. Credit days are paid time-off to compensate for work performed in excess of the regular (38 hours) working week. Under existing

\begin{footnotesize}
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  \item[24] According to the Council of Europe only Hungary has a higher average density: Council of Europe, Directorate of Communications, "European prisons make some progress to reduce overcrowding", Press release – DC038(2016).
  \item[27] De Standaard, "Regering is het lekken van geheime informatie 'kotsbeu'" ["Government has had it with the leaking of secret information"] at <www.standaard.be> (accessed on 21 June 2016).
\end{itemize}
\end{footnotesize}
arrangements both days of actual work and time away from the workplace due to illness or holiday leave are credited towards any such 'credit' days. Public transport workers vehemently object to the status quo being upset by the suggestion that in future credit days accrue on the basis of actual rather than nominal days of work performance. Intriguingly, the union's own estimates show that the average employee thus would be deprived of no more than one to two days (paid) leave annually.

The industrial action once again emanated mainly from railway personnel employed in Wallonia. With no immediate end in sight, inconvenience to the traveling public was manifest. Because of the timing of the industrial action, one particular group of affected commuters were students preparing to sit their end-of-year exams. Rik Torfs, Professor of (canon) law and (outspoken) Vice-Chancellor at the Catholic University of Leuven in Flanders, was particularly blunt when he accused the rail unions of "group egoism of the highest order".28 HR-Rail, technically the national railway employer, for its part sought to invoke the penalty clause in its collective union agreement to the effect that unofficial strikers receive a severe reprimand together with the one-off forfeiture of a (financial) productivity bonus. Needless to say, this would only further complicate any compromise by both parties in settling their dispute.

In an expression of solidarity with their 'comrades' from the (French) socialist union CGSP in its protest against the Michel government, the Brussels and Walloon metal workers in early June 2016 served notice of industrial action for the remainder of 2016.29 In the end common sense (of sorts) prevailed. A compromise agreement with the various railway unions was reached on 16 June 2016.30 In typical Belgian fashion, though, it did not prevent one of the national umbrella unions - the socialist ABVV - from calling, less than a week later, for a day of action on 24 June 2016 throughout all sectors of the economy in protest against the government's austerity policies. While declaring its satisfaction with the settlement on credit day

28 "Groepsegoïsm van de bovenste plank" as cited in Het Belang van Limburg, "Rik Torfs haalt uit naar spoorbonden: <Ze hebben niet het minste respect>" ["Rik Torfs blasts railway unions: <They don't show the slightest respect>"] at <www hbvl.be> (accessed on 4 June 2016).
30 De Standaard: "Nieuwe spoorstaking van de baan" ["Further rail strikes off the table"] at <www.standaard.be> (accessed on 17 June 2016).
entitlements, the public sector branch of the socialist union ACOD nonetheless felt compelled "to follow ABVV orders" in this matter. 31

F Enter the Judiciary

At the start of the Belgian summer 2016 the federal judiciary itself gave official notice that it too was being affected by the budget cuts imposed by current and previous governments alike. Lamenting the 'decay' of the justice department, president of the French-speaking court personnel Manuela Cadelli, justified the 'action' taken by the judiciary – a delay in the start of all court sessions by half an hour on Tuesday 7 June 2016 – by stressing that the independence of the judiciary as enshrined in the Constitution has come under threat. Specifically, the Belgian judiciary is said no longer to be able to protect the citizens against 'institutional imbalances' by acting as a 'counter-balance' against the executive branch.32

G National or Regional Problem?

Most vocal in all of the above have been public sector employees and their unions in the French-speaking part of Belgium. But it does not follow that any unease with the Michel government is wholly absent from Flanders. At the national day of action on 24 May 2016 some 50,000 to 60,000 people marched through the streets of Brussels. Also present were members from the Flemish chapters of the two main national unions, ACV and ABVV. Ironically, any anti-government demonstrators who elected to travel to Brussels by public transport enjoyed a special 'group' discount on their fares; further, the NMBS (the state-owned national rail road company), made provision for no fewer than eight extra trains to ensure that everyone could get to and from the demonstration in comfort!33

31 "We zitten in een moeilijke situatie. We zijn tevreden met het akkoord over de kredietdagen, maar we volgen de orders van het ABVV" ["We find ourselves in a delicate situation. We are happy with the settlement on credit days, but we comply with ABVV orders"] Chris Camps, spokesperson for the socialist public sector (ACOD) union quoted by Niels Lisson writing for Het Belang van Limburg, "Vrijdag nieuwe nationale staking: grote hinder verwacht bij De Lijn en het spoor" ["New national strike on Friday: major disruption expected at [public bus transport organisation] De Lijn and rail"] at <www.hbvl.be> (accessed on 23 June 2016).

32 Source BELGA: "Alle zittingen zullen dinsdag met half uur vertraging beginnen" ["All Tuesday sessions to commence with a half-hour delay"] at <www.hbvl.be> (accessed on 6 June 2016)

33 By contrast, the offer of a free shuttle service for high school students sitting exams on the day of the national 'day of action' in Liège, the main city in the Walloon region, was met with threats directed at personnel of the bus company engaged to transport the students: Source: BELGA, "Uitbater pendelbusdienst voor gestrande Luikse studenten bedreigd" ["Contractor shuttle service for stranded Liège students threatened"] De Morgen, 23 May 2016, at <www.demorgen.be> (accessed on 24 May 2016).
A further national strike on 24 June 2016 was organised by the socialist ABVV union without support from its Christian-democratic ACV counterpart. Not everyone was happy with the timing of this follow-up action. A senior union official from ABVV reportedly commented that a new 'build-up' of the protest action in September (ie in autumn and therefore after the summer holidays) would have been preferable.34

**H "Ça suffit!"**

With these words Prime Minister Charles Michel gave voice to his frustration with the on-going protests against his government.35 While reiterating the federal government's top priorities of labour market modernisation, deficit control and the associated public health and pension reform, Michel acknowledged the perceived inadequacy of consultation and dialogue with the public at large. In an unusual move, Michel openly reflected that the current Belgian system of general elections once every four years might have become insufficient to create the necessary climate of public involvement and trust. Perhaps rather disturbingly, especially in view of the mixed experience with public consultations elsewhere, the Prime Minister's own personal choice for the (unspecified) future then was to resort to public referendums concerning "important societal options".36

The Belgian public, for its part, continues to see the humorous side of it all. Typical in this respect was the suggestion by one the Flemish broadsheets to the effect that long-suffering commuters, while clearly inconvenienced because of the on-going industrial action affecting rail travel, could take financial advantage of the opportunity thus created simply by invoking the compensation clause in their contract of carriage with the NMBS railway company!37

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34 "Het is een kunst om op het juiste moment naar actie te gaan." ["It requires skill to pick the right moment for taking action."] Source: BELGA, reported in De Standaard of 23 June 2016 at http://www.standaard.be (accessed on 24 June 2016).

35 Interview with Prime Minister Michel published in De Standaard on 28 May 2016 under the title: "Michel: Zo is het genoeg. Dit protest is niet langer onschuldig." ["Enough is enough. This protest is no longer innocent."] at <www.standaard.be> (accessed on 30 May 2016).

36 "Belangrijke maatschappelijke keuzes": ibid.

**III LEGAL REFLECTIONS AND BELGIAN PECULIARITIES**

**A Strike Action: Right or Freedom?**

From a labour law perspective, industrial action - including strikes – can make sense whenever it is linked to collective bargaining. As the classic adage goes, without at least the threat of strike action collective bargaining risks being reduced to mere collective begging.\(^{38}\) Even in Australia, its otherwise restrictive federal law notwithstanding,\(^{39}\) strike action in the pursuit of an enterprise agreement can amount to protected action, thus effectively bestowing legal immunity upon any participating union and individual employees alike.\(^{40}\) It did not always use to be this way. Australia shares with New Zealand a long history of resolving industrial disputes through a system of compulsory conciliation and arbitration 'in the public interest'.\(^{41}\) Crucially, forgoing the right to take industrial action then was the price collective participants had to pay in exchange for a guaranteed (peaceful) settlement of their disputes without having to 'fight it out' on the streets. Deregulation of the labour market during the final two decades of the 20th century triggered an official shift towards decentralised collective bargaining on both sides of the Tasman Sea.\(^{42}\) Again crucially, it meant that, as put by prominent Australian labour law scholars Breen Creighton and Andrew Stewart, "the traditional proscription of all forms of industrial action could no longer be sustained in either law or practice".\(^{43}\) Regardless, both the union and employees seeking to engage in, henceforth, lawful industrial action must meet various statutory requirements including, in particular, prior notice and a secret employee ballot.\(^{44}\)

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40 See Part 3-3, Division 2 of the *Fair Work Act 2009* (Cth).

41 For New Zealand, see the Industrial Conciliation and Arbitration Act 1894; the Australian (federal) equivalent is the Conciliation and Arbitration Act 1904 (Cth).

42 For New Zealand, see the *Labour Relations Act 1987*. For Australia, see the *Industrial Relations Reform Act 1993* (Cth).

43 Creighton and Stewart, above n 39, at 836.

44 For New Zealand, see ss 82A (secret ballots) and 86A (prior notice) of the *Employment Relations Act 2000*; for Australia, see s 414 (notice requirements) and Part 3-3, Division 8 (protected action ballots) of the *Fair Work Act 2009* (Cth).
Belgium presents a very different picture. Unlike the legal position in neighbouring France, the Belgian Constitution does not contain a reference to the right to strike nor, for that matter, are unions in that country particularly keen on reading such a right into the Constitution, this for fear of inviting courts to find ways of imposing restrictions on the exercise thereof. More strongly, Belgian unions have traditionally resisted having legal personality bestowed upon their own organisations so as to maximise 'flexibility' in their pursuit of members' interests, ie without fear for legal repercussions should organised labour stray beyond the boundaries of the law. It follows that Belgian unions are not legally accountable when invoking the strike weapon. Instead, individual organisers and participants in strike action only can be sued. Needless to say, any resort to such legal action often proves impractical and most certainly ill-advised as it risks exacerbating the underlying conflict.

**B Strike Action: Collective and/or Individual?**

The link between lawful strikes and collective bargaining has its antecedents in international law. As indicated in the Introduction section to this article, this much is made clear by the case law of the ILO supervisory bodies in the context of Convention No 87 on Freedom of Association and Protection of the Right to Organise (1948) and Convention No 98 on Right to Organise and Collective Bargaining (1949). Where the pursuit of collective bargaining for wages and other

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46 The observation carries extra weight as it is made by Professor Roger Blanpain, the *doyen* of Belgian labour law. See R Blanpain "Belgium" in R Ben-Israel (guest Editor) Strikes and Lockouts in Industrialized Market Economies (Bulletin of Comparative Labour Relations, No 29, 1994, Kluwer, Deventer) 31.

47 During debates in Senate Committee prior to the adoption of the Act of 5 December 1968 concerning Collective Bargaining Agreements and Joint Committees one of the Senate Committee members dismissed any suggestion of a separate legal personality for Belgian unions as "useless, ineffective and dangerous": R Blanpain *Schets van het Belgisch arbeidsrecht* (10th ed, Die Keure, Brugge, 1992) 220.

48 Blanpain notes that nevertheless, some employers, "guided by top law firms in Brussels", have sought to bring court proceedings for an injunction to stop certain activities associated with strike action such as, in particular, plant occupations and picketing where it blocks access to the workplace by non-striking workers: above n 46, at 36.

49 See, generally, L Swepton "International Labour Law" in R Blanpain (ed) Comparative Labour Law and Industrial Relations in Industrialized Market Economies, above n 4, 141 at 151-152.
conditions of employment is the legal prerogative of the union, this would suggest that any right to strike is a collective entitlement first and foremost.

Even when in the pursuit of a collective bargaining agreement, lawful industrial action is not without its limits. Most illuminating is the case of Germany. German courts traditionally insist on the strike weapon being used only as a means of last resort. Because of this so-called *ultima ratio prinzip*, strikes cannot be allowed to occur at the very start of a new bargaining round, for instance. Further, the exercise of the right to strike must comply with the principle of proportionality.\(^{50}\) Intriguingly, the very principle of proportionality has since made its way into EU parlance. It is one of two core principles that govern the use of Union 'competences' post-Lisbon.\(^{51}\)

France and Belgium offer a rather different picture from the legal situation in Germany. No clear distinction is made between 'economic' strikes, which are in the pursuit of collective bargaining, and 'political' strikes aimed at the government of the day. Of further note is that no real distinction is made between the legal treatment of 'official' strikes (called by the official – union – representative of the workers, typically upon prior notice to the employer party) and unofficial, spontaneous (wildcat) action engaged in by workers directly. An explanation, at least in part, for this broad-brushed approach to the legal treatment of industrial action has been sought in the constitutional basis of strike as an individual right in France.\(^{52}\) As for Belgium, its Supreme Court (*Hof van Cassatie; Cour de cassation*) has held that an Act of Parliament - adopted in 1948 to address the legal ramifications of industrial action affecting essential services - implicitly confers an individual right to employees, allowing these to withhold their labour the individual contract of employment notwithstanding.\(^{53}\) The latter decision pre-dates the EU Charter of Fundamental Rights by some two decades.

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50 In German, this is known as the *Verhältnismäßigkeitssprinzip*. See M Weiss and M Schmidt *Labour Law and Industrial Relations in Germany* (4th ed, Wolters Kluwer, The Netherlands) 203-204.

51 The other principle is that of subsidiarity: see art 5 Treaty on European Union.


C Strike Action: Private and Public Sector?

It will be clear from the factual accounts provided in this article that the various incidences of industrial action that occurred in Belgium throughout the first half of 2016 typically involved public sector employees. That need not turn the industrial action *ipso facto* into political action. Even in the absence of specific case law on the subject-matter, the legal treatment of striking public servants is premised on the assumption that a general prohibition of strikes lacks validity in any event. But, of course, by its very nature employment in the public sector is special. In Germany the prohibition of strike action thus is deemed legitimate when applied to core civil servants (the so-called *Beamte*) only.

There is no direct link between public sector employment and the performance of essential services. Certainly, the notion of 'essential services' can be notoriously difficult to define with precision. Alfred Pankert, Head of the Labour-Management Relations Section at the International Labour Office, has suggested that the expression fundamentally refers to instances in which the right to strike can be curtailed in order to protect the public interest. As regards the latter, in Belgium the deliberate abstention of the Parliament from regulating industrial action in favour of the social partners has meant that, once again, it has been left to the collective representatives of employee and employer - the so-called 'social' legislature - convened in joint committee, to autonomously decide upon the matter. To be sure, the 1948 facilitative legislation contains some provisions that allow for more 'forceful' third-party intervention. Thus, but only as a last resort, the federal Minister for Labour can request the joint committee in the relevant sector of industry to convene and, failing a committee determination, 'impose' a Royal Decree to ensure essential services are maintained. Intriguingly, even then a decision by Belgium's National Labour Council, comprising the national representatives of unions and employer organisations, is required to formally sign off on a Ministerial

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54 ATJM Jacobs "The Law of Strikes and Lockouts" in R Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, above n 3, 659 at 689. Jacobs notes that in France, by contrast, case law exists that grants civil servants the right to strike since 1950: at 688.

55 It also traditionally comes with a lower salary compensated by increased job security and better pension rights when compared to employment in the private sector.


57 Act of 19 August 1948, above n 53.
determination in the matter. With respect, in light of the 2016 social and economic disruption of Belgian society, this approach may take the notion of social autonomy beyond what is fair and reasonable. Perhaps the time has come to move beyond the post-war statutory regime, especially since the application of the 1948 Act is confined to the private sector. The coverage of the Act does not extend to public sector employees.

IV BELGIUM: DYSFUNCTIONAL STATE?

In the opening sentence to his classic work on The Worker and the Law Lord Wedderburn boldly states that 'most workers want nothing more of the law than that it should leave them alone'. While addressing the relationship between workers and the law in Britain, and even though Wedderburn himself acknowledges that, since the book's first edition appeared in 1965 'much has happened' in the legal regulation of British labour law, the underlying sentiment of this, most famous opening statement continues to hold true for the legal regulation of strikes in Belgium to a remarkable degree.

In seeking to explain the sheer scale and intensity of the social disruption that held Belgium in its grip throughout much of early 2016 some academic commentators have taken to the general media, suggesting a link with government attempts at modernising employment conditions in the public sector especially. Pointing at the two most vocal categories of public sector employees to date, prison guards and national rail personnel in particular, these scholars submit that the process of change has barely started.

Other academic commentators stress that the problem is by no means confined to Belgium as there appears to be a more general malaise among policy makers throughout Europe. Special mention is made of the EU whose leaders are said to lack 'inspiration', 'moral courage' and even 'optimism'. Be that as it may, exacerbating the problem are distinctly local factors in play in Belgium and referred to throughout this article. To paraphrase Professor Torfs once more, apart from the 'mental divide'

59 Ibid.
60 See eg Professor Annie Hondeghem, Director of the Leuven Institute for Government Studies (Leuven Instituut voor de Overheid) in De Standaard, 31 May 2016.
61 Professor Rik Torfs "Wie redenen heeft om het staken, is niet verplicht dat te doen" ["Whomever has reason to strike is under no obligation to act upon it"] published in the opinion section of De Morgen, 30 May 2016. These comments resonate even more loudly post the Brexit referendum.
between Flanders and parts of Wallonia, the local factors are a 'complex' federal state structure, and a seemingly 'directionless' Brussels.62

Ultimately, the right to strike surmounts the domain of labour law. This much is made clear by the case law of the European courts in both Luxembourg and Strasbourg. Thus, in *Laval* (2007) the Court of Justice of the European Union was confronted with the exercise of the right to strike in circumstances where the Luxembourg Court had to balance the social and economic dimensions of Europe, specifically – as for the latter - the freedom of establishment.63 While not everyone may have unreservedly approved of the decision, *Laval* confirms that this balancing act inevitably necessitates a value judgment.64 Context clearly matters, even when the right to strike is to be judged against a backdrop of human rights. Decisions by the European Court of Human Rights in *Demir* (2008) and *Enerji* (2009) confirm this.65 Both cases concerned the right to strike in the Turkish public sector. Although ruling that a general ban on strike action in the public sector is excessive, the Strasbourg Court confirmed that the right to strike is not absolute.

62 Ibid.

63 *Laval un Partneri*, case C-341/05, 18 December 2007, ECR 2007 I -11767.
