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Brief remarks on Article 52 of the Italian Constitution

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ABSTRACT

Article 52 is the provision of the Italian Constitution that plays a central role in matters concerning the armed forces and military personnel. However, it has barely attracted the attention of scholars in constitutional law, but rather that of some experts in administrative law and military criminal law. During its drafting, the choice fell on terms that were more properly related to ethics. This has created exegetical difficulties, which are still partly unresolved, at least with regard to the last paragraph.

KEYWORDS

Italian Constitution; Armed Forces; Duty; Ethics.

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Brief remarks on Article 52 of the Italian Constitution

This contribution aims to offer some observations on the language used in the drafting of the Italian Constitution and, in particular, of Article 52 of the said Constitution.

Although Article 52 of the Constitution is not the only constitutional provision dealing with the Armed Forces and military personnel, it must certainly be regarded as the one called upon to play an absolutely crucial and fundamental role in this area.

The debate held during the meeting of the First Sub-Committee on 15 November 1946 began with the text proposed by the Rapporteur, the Christian Democrat lawyer Umberto Merlin, namely the following: “Military service is compulsory for all. The defence of the Fatherland is one of the highest duties”. The aforementioned proposer, in explaining his choice, had stated that he had drawn inspiration from Article 133 of the Russian Constitution, which states that the defence of the Fatherland is “a sacred duty of the citizen”. It is, however, quite clear that there was a significant difference between the wording from which the work had taken its cue and its stated model (the statement regarding the importance of the duty of defence for Italians was undoubtedly less ‘significant’ than the one from which it drew inspiration).

After a series of speeches, all of them fairly critical, a very young Aldo Moro, also a Christian Democrat, took it upon himself to summarise the debate, proposing an article comprising three paragraphs. The first two had been reworded as follows: 1) “The defence of the Fatherland is one of the highest duties of the citizen”; 2) “Military service is compulsory. It shall not prejudice the soldier’s employment or the exercise of political rights”. The reversal of the order of the clauses – which is immediately apparent if one compares the two texts – had been justified by the need to emphasise decisively that the use of military force (as argued, above all, by Giuseppe Dossetti) must be strictly limited to defence.

¹Military Advocate General at the Military Court of Appeal in Rome.

The suggestion just mentioned was essentially incorporated, but the final text of the first two paragraphs is still different from that reproduced above and reads as follows: 1) “The defence of the Fatherland is a sacred duty of the citizen”; 2) “Military service is compulsory within the limits and in the manner established by law. Its fulfilment does not prejudice the citizen’s employment status, nor the exercise of political rights”.

The defence of the homeland, therefore – for the Italian framers of the Constitution (who also emphasised this in some of their speeches) – was not one of the various duties incumbent upon the citizen, but the highest legal duty, an obligation of personal service that could extend to the sacrifice of one’s life, a genuine ethical and moral imperative, as was clearly evident from the choice to include both the noun ‘Fatherland’ and the adjective ‘sacred’. A few years later, in 1967, Professor Aldo Mazzini Sandulli, in the reasoning for a judgment of the Constitutional Court (No. 53), wrote that “the defence of the Fatherland – which is a prerequisite for the preservation of the national community – represents a duty placed above all others, and which no law could nullify. It is a duty which, precisely because it is ‘sacred’ (and, therefore, of an eminently moral nature), is intimately and indissolubly linked to membership of the national community identified as the Italian Republic”. Subsequently, however, the same Constitutional Court judge² endorsed a somewhat more nuanced view, according to which “the duty to defend the homeland” should be regarded merely as a sort of “specification of [...] the duty of citizens to be loyal to the Republic and to obey the Constitution and the laws”, with the implicit consequence that – in an ideal hierarchy of fundamental norms – Article 52 would not be as significant as had been assumed fifteen years earlier. In reality, on closer inspection, the provision of the first paragraph of Article 52 of the Constitution, by using the term ‘Fatherland’, which immediately evokes ‘the land of our forefathers’, can only allude to the need to defend the latter from a danger posed by an external enemy: it follows, in my view, that the duties to defend the territory and its population and that of loyalty to the institutions and to the provisions of higher-ranking legal sources stand – at the very least – on parallel planes and are endowed with equal dignity.

The following paragraph, moreover, clearly refers to compulsory military service. The Communist leader Palmiro Togliatti had, in fact, asserted that “with voluntary military service” there would be “a category of professionals who could spell the ruin of

² See Constitutional Court, judgment of 20 January 1982, No. 31, rapporteur Michele Rossano.

a society or the ruin of the State”, and it was certainly preferable to impose a model in which “the entire people take up arms and are ready to defend the soil of the homeland”. For the founding fathers, therefore, it was unthinkable that the majority of military personnel, or indeed all of them, could be career soldiers, although a passage in the third paragraph of Article 98 clearly implies that a professional component was in any case to coexist with the prevailing ‘compulsory’ one.

Today, in an era of suspended conscription and changed sensibilities, one might perhaps offer a further and different interpretation of this second paragraph and argue that the compulsory nature of military service implies that those who enlist are subject to additional obligations (or duties) compared to those of the ordinary citizen. Conversely, however, the ordinary legislator would in any case be required – through the explicit provision of a relative legal reservation – to ensure that all men and women in uniform enjoy not only political rights but also the constitutionally guaranteed freedoms, which – as repeatedly stated by the Constitutional Court – may be subject to limitations (in order to preserve the adequate cohesion and necessary efficiency of the Armed Forces) and, despite this, may never be denied, infringed and/or completely excluded.

If we accept this interpretation, then the provision in question would constitute the constitutional foundation not only for the structural framework that must characterise the Armed Forces, but also for the provisions of the Code of Military Law (and consequently, to return to the theme of this book, of Article 1347 of Legislative Decree No. 66 of 2010 on the duty of obedience) and even of military criminal law itself (thus imposing a constitutionally oriented interpretation of the two codes of 1941, the peacetime and wartime codes, which evidently have a very different political and cultural background).

Having briefly discussed the first two paragraphs, we must now turn our attention, just as briefly, to the genesis and meaning of the final paragraph, which today reads: “The organisation of the Armed Forces is guided by the democratic spirit of the Republic”. In this regard, indeed, the starting point was Aldo Moro’s wording (which had found no precedent in the aforementioned proposal by the Honourable Merlin, despite the latter being a fellow party member), namely: “The regulations of the army must reflect the democratic spirit of the Italian State”.

The intention pursued in this instance had been immediately made clear by the proposer himself, who had straight away pointed out that: “The final provision set out in

the article he presented” was “indispensable in the light of what has happened in Italy and tends to occur in every army: the provision aims to ensure that the democratic spirit of the country permeates the army in a manner compatible with the army’s hierarchical structure. It is unthinkable that the military hierarchy should stifle human dignity, as has all too often happened through military disciplinary regulations”.

The aim was to turn the page on the Fascist era and the idea of blind adherence to and obedience of the sole creed worth fighting for.

As early as November 1946, in fact, some people – and, in particular, Ottavio Mastrojanni, a member of the Fronte dell’Uomo Qualunque – had harshly criticised the text of the aforementioned third paragraph, considering it to be an overly ideological stance, and emphasising that any military force should be kept outside and above the political arena and, therefore, its loyalty to the Fatherland should be ensured, but not to a specific form of state.

In the years that followed, however, some legal scholars – including, among others, Vittorio Bachelet – gave considerable thought to the meaning of the phrase ‘democratic spirit’, firmly ruling out the possibility that, in structuring the hierarchy within the armed forces, institutions typical of representative democracy could be used, and ultimately considering that the statement as a whole was entirely redundant, given that it merely established that the military system cannot disregard respect for inviolable human rights, the principles of solidarity and non-discrimination (except on grounds of merit) referred to in Articles 2 and 3 of the Constitution.

One such figure, Guido Landi, Section President of the Council of State and an expert in military administrative law, has argued in his writings that such a “statement [...] requires those who legislate on matters relating to the Armed Forces not to forget that they are not a *corpus separatum*” and, therefore, the rules of the military community could never be completely distinct from, or indeed contrary to, those of so-called civil society.