JUDGMENT NO. 120 YEAR 2018

In this case, 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 European Social Charter (ESC). The Court held that the ESC constituted international law for the purposes of Article 117(1) of the Constitution, 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. Moreover, since Italian constitutional law *required* the imposition of such limits, the Court instructed the legislature to adopt suitable legislation and ordered that certain provisions regulating military representation bodies that had already been enacted should apply pending the enactment of such legislation.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 1475(2) of Legislative Decree no. 66 of 15 March 2010 (Code of Legislation on the Armed Forces), initiated by the Council of State and the Veneto Regional Administrative Court by the referral orders of 4 May and of 3 November 2017, registered respectively as numbers 111 and 198 in the Register of Referral Orders 2017 and published in the *Official Journal* of the Republic no. 36, first special series 2017, and no. 3, first special series 2018.

Considering the entries of appearance by *Associazione solidarietà diritto e progresso* (AS.SO.DI.PRO.) [Association Solidarity Law and Progress] and F. S., as well as the interventions by the President of the Council of Ministers, P. D.N. and others, SILP *CGIL − Sindacato Italiano Lavoratori Polizia CGIL* [Italian Police Workers' Trade Union CGIL], *FICIESSE − Associazione Finanzieri Cittadini e Solidarietà* [Association Tax Police Officers Citizens and Solidarity], *F.P. CGIL − Federazione Lavoratori della Funzione Pubblica CGIL* [Federation of Civil Service Workers CGIL], the *CGIL − Confederazione Generale Italiana del Lavoro* [Italian General Confederation of Labour], S. D. and others, P. C. and others, and A. B. and others;

having heard the Judge Rapporteur Giancarlo Coraggio at the public hearing of 10 April and in chambers on 11 April 2018;

having heard Counsel Andrea Saccucci for *AS.SO.DI.PRO* and F. S., Counsel Emanuela Mazzola for P. D.N. and others, for *SILP CGIL*, for *FICIESSE*, for *F.P. CGIL*, for the CGIL and for S. D. and others, Counsel Romano Vaccarella for P. C. and others, and Counsel Egidio Lizza for A. B. and others and State Counsel [*Avvocati dello Stato*] Maurizio Greco and Carlo Sica for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.− By the referral order of 4 May 2017 (Register of Referral Orders no. 111 of 2017), the Council of State raised a question concerning the constitutionality of Article 1475(2) of Legislative Decree no. 66 of 15 March 2010 (Code of Legislation on the Armed Forces), due to the violation of Article 117(1) of the Constitution, in relation to Articles

11 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, ratified and implemented by Law no. 848 of 4 August 1955, to the judgments issued on 2 October 2014 by the fifth section of the European Court of Human Rights (ECtHR) in *Matelly v. France* and *Association de Défense des Droits des Militaires (ADefDroMil) v. France*, and to Article 5, sole paragraph, third sentence, of the European Social Charter, revised, with appendix, done in Strasbourg on 3 May 1996, ratified and implemented by Law no. 30 of 9 February 1999.

2.− A similar question of constitutionality was raised by the Veneto Regional Administrative Court by the referral order of 3 November 2017 (Register of Referral Orders no. 198 of 2017).

3.− The proceedings are to be joined for decision in a single judgment, given that the questions are identical.

4.− By the order issued during oral proceedings on 10 April 2018, which is annexed, the interventions made in the proceedings initiated by the Council of State by *F. P. CGIL − Federazione Lavoratori della Funzione Pubblica CGIL*, CGIL − *Confederazione Generale Italiana del Lavoro, SILP CGIL − Sindacato Italiano Lavoratori Polizia CGIL, FICIESSE − Associazione Finanzieri Cittadini e Solidarietà*, P. D.N. and others, S. D. and others, A. B. and others, and P. C. and others were ruled inadmissible, on the grounds that the persons concerned were not parties to the main proceedings and lacked any qualified interest that was directly and immediately inherent within the substantive relationship averred within the proceedings.

5.− The question of constitutionality raised by *Associazione solidarietà diritto e progresso (AS.SO.DI.PRO.)* and by F. S. in relation to Article 6 of the European Social Charter is inadmissible in that it extends the *thema decidendum* as delineated by the referral order (*ex multis*, Judgments no. 276 and no. 203 of 2016, no. 56 of 2015 and no. 271 of 2011).

6.− The objection that the question is inadmissible, raised by State Counsel in relation to the alleged shortcomings in the integrity of the oral stage within the main proceedings before the Council of State, cannot be accepted, in view of the self-standing status of interlocutory proceedings before the Constitutional Court.

The assessment as to the relevance of the question made by the Veneto Regional Administrative Court (referral order no. 198 of 2017) is not implausible. Therefore, the objection of inadmissibility raised by the President of the Council of Ministers, according to whom the disciplinary offence at issue in the main proceedings should have fallen under Article 1470(2) of Legislative Decree no. 66 of 2010, must be rejected.

7.− Both referring courts recall that Judgment no. 449 of 1999 of this Court ruled unfounded the question concerning the constitutionality of the analogous Article 8(1) of Law no. 382 of 11 July 1978 (Provisions on the principles of military discipline), raised with reference to Articles 3, 39 and 52(3) of the Constitution. However, they consider that the interposed rules invoked in this case establish new grounds for unconstitutionality, since the international law incorporated as an interposed parameter by Article 117(1) of the Constitution recognises the right to associate within a trade union also to military personnel, thereby preventing national legal systems from refusing such a right or from imposing restrictions on its exercise that are liable to result in its substantive negation. They also consider that bodies such as the military

representation bodies currently provided for under Italian law cannot constitute adequate compensatory measures.

8.− The first interposed parameter is Article 11 ECHR, which is entitled "Freedom of assembly and association". Paragraph 1 of that Article recognises the right to join a trade union, the exercise of which – according to paragraph 2 – cannot be subject to restrictions other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. Article 11 goes on to stipulate that the provision does not prevent the imposition of "lawful restrictions" on the exercise of those rights by members of the armed forces, of the police or of the administration of the State (paragraph 2, second sentence).

Article 14 ECHR in turn enshrines the principle that the enjoyment of the rights and freedoms set forth in the ECHR shall be secured without discrimination.

8.1.− As is noted in the referral orders, Article 11 has been considered in recent judgments of the ECtHR in the *Metelly* and *ADefDroMil* cases, which concerned the establishment of a professional association having the nature of a trade union between members of the armed forces, which was declared by the French authorities to be incompatible with Article L.4121-4 of the *Code de la Défense* in force at that time.

In those decisions, 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 freedom of association (paragraph 55 of the *Matelly* judgment, paragraph 41 of the *ADefDroMil* judgment); it then goes on to recall that paragraph 2 of that Article does not exclude any professional category from its scope and that, with regard to 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, and 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*".

The judgments constitute an expression of a settled position within the case law, which reasserts the principles already set forth in the judgment of the Grand Chamber of 12 November 2008 in *Demir and Baykara v. Turkey* (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*, given on 21 April 2015 by the third section of the ECtHR (concerning a trade union established by police officers).

It is significant that, in order to ensure compliance with the *Matelly* and *ADefDroMil* judgments, the French legislator adopted Law no. 2015-917 of 28 July 2015, which amended the provision incompatible with the ECHR by recognising the right of professional association in accordance with the provisions laid down in dedicated legislation.

9.− According to the ECHR provision, as construed by the ECtHR − which Article 32 ECHR vests with the power of interpreting its provisions − it may be concluded that the right granted to the Contracting States to introduce restrictions on the exercise of trade union rights by military personnel cannot extend so far as to negate outright any right to establish trade union associations.

Thus, the prohibition on the establishment of such associations contained in the contested legislation is incompatible with Article 11 ECHR.

10.− The referral order also alleges a violation of the European Social Charter, as revised in 1996, which brings together in one single treaty the rights recognised under the original version from 1961 along with those added by the Additional Protocol of 5 May 1988, which came into force on 4 September 1992.

10.1.− For the purposes of establishing whether it is admissible to invoke that interposed parameter, it must be pointed out that it features distinctive aspects that are highly specific compared to ordinary international agreements, which aspects it shares with the ECHR. In fact, whereas the ECHR sought to create a "system for the uniform protection" of fundamental civil and political rights (Judgment no. 349 of 2007), the Charter constitutes its natural completion on the social level since, as is stated in the Preamble, the Member States of the Council of Europe sought to extend protection also to social rights, recalling the indivisibility of all human rights.

Thus, by virtue of these characteristics, the Charter must be classified as international law within the meaning of Article 117(1) of the Constitution. It therefore lacks direct effect and cannot be applied directly by the ordinary courts, but is dependent upon the intervention of this Court, to which the question on the constitutionality of the national law considered to violate the Convention, in light of the aforementioned Article 117(1) of the Constitution, is to be submitted. This all the more so in consideration of the fact that it is made up predominantly of statements of principle requiring progressive implementation, thereby calling for particular attention when considering the time scales for and manner of their implementation.

10.2.− However, Article 5 of the Social Charter has a precise consent. It is entitled "The right to organise" and provides that: "With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations".

The content of the provision is thus similar to the corresponding ECHR provision and, consequently, it must also be concluded that the exclusion by the signatory states of the right for military personnel to associate within a trade union is incompatible with it.

11.− In the light of both parameters, which are binding pursuant to Article 117(1) of the Constitution, military personnel must be recognised the right to join professional trade unions.

12.− However, the scope and extent of that right must be clarified in the light of the overall content of the international provisions invoked.

As mentioned above, both provisions associate the assertion of the principle of freedom to associate within a trade union with the consequent acknowledgement that it is possible for the law to impose restrictions on its exercise by certain categories of public worker. It is therefore necessary to verify whether and to what extent that right may or must be exercised, including in the light of the constitutional principles applicable to military law.

13.− It is in relation to this twofold issue that the part of Article 1475(2) of Legislative Decree no. 66 of 2010 − which has been challenged as a whole − that prohibits military personnel from "join[ing] other trade union associations" is first and foremost significant.

13.1.− As far as the ECHR is concerned, the question has not been expressly considered in any ruling of the ECtHR addressing the specific issue of freedom of association for military personnel. On the other hand, the prohibition does not appear to be incompatible with the text of the provision in question, as interpreted in general terms by the case law, as it does not entail the negation of an essential aspect of freedom of association.

13.2.− This is moreover consistent with our constitutional principles, which have been interpreted and analysed in considerable depth within the case law of this Court.

In Judgment no. 126 of 1985 it was asserted that, in providing that military personnel have rights as citizens and in stipulating that the law may impose restrictions on the exercise of those rights along with a requirement to comply with particular duties (only) in order to guarantee the performance of the tasks of the armed forces, Law no. 382 of 1978 "reflects the requirement, emanating from the Constitution, that the democratic nature of the law applicable to the armed forces be implemented to the fullest extent compatible with the pursuit, by them, of their own institutional goals".

By Judgment no. 278 of 1987, this Court then clarified that the Constitution marked a radical break with the institutionalist logic of military law and brought also this area of the law under the scope of the general legal system, which ensures particular respect and guarantees for the substantive and procedural rights of all citizens, whether military personnel or not.

Finally, the principles referred to in Judgment no. 449 of 1999 are of particular significance. This Court was required to rule on the constitutionality of Article 8(1) of Law no. 382 of 1978 in relation to Article 39, construed in conjunction with Article 52(3) of the Constitution. The provision, which had been repealed following the adoption of Legislative Decree no. 66 of 2010, was substantially identical to the current provision in stipulating that "[m]ilitary personnel may not exercise the right to strike, establish professional trade union associations or join other trade union associations" and, in ruling the question unfounded, this Court held that particular requirements of "internal cohesion and neutrality" set the armed forces apart from other state structures; it held in particular that Article 52(3) of the Constitution "refers to the 'organisation of the armed forces' not in order to indicate its (inadmissible) extraneousness from the general legal system of the State but in order to encapsulate, in that wording, the absolutely special nature of its function".

13.3.− Accordingly, the specific characteristics of military law justify the prohibition of forms of association that are considered not to be consistent with the resulting requirements of compactness and unity of the bodies comprising such organisation.

13.4.− Similarly, the inadmissibility of such a limit cannot be inferred from the provisions of the European Social Charter, the wording of which − as noted above − does not depart from the ECHR.

Moreover, the decision adopted by the European Committee of Social Rights on 27 January 2016 and published on 4 July 2016 in *Conseil Européen des Syndicats de Police (CESP) v. France* (complaint no. 101/2013) cannot be invoked in support of the opposite conclusion.

In contrast to the ECHR, the European Social Charter does not contain any provision the effect of which is equivalent to Article 32(1), which provides that "[t]he jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto […]". In turn, the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints does not contain any provision analogous to Article 46 ECHR, which asserts that "[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties", a provision which establishes the status as *res iudicata* of the judgments given by the ECtHR in relation to the state(s) that are parties to the case as well as the actual dispute ruled upon by the Court.
Thus, the position stated by this Court in Judgment no. 348 of 2007 cannot apply in relation to the decisions of the European Committee of Social Rights: "[s]ince […] the provisions of the ECHR live through the interpretation given to them by the ECtHR, the examination of constitutionality must give consideration to the norm as a product of interpretation, and not the provision considered in itself".
Within the context of the relations thereby framed between the European Social Charter and the signatory states, the decisions of the Committee, whilst being authoritative, are not binding on the national courts when interpreting the Charter, especially if − as in the case at issue here − the expansive interpretation proposed is not confirmed by our principles of constitutional law.
14.− Therefore, the question of constitutionality is unfounded insofar as it relates to the prohibition on "join[ing] other trade union associations", as a result of which prohibition it is necessary that the associations in question be comprised solely of military personnel and cannot join other associations.
15.− In order to ensure that the constitutional law in this area is correctly implemented, it is necessary for this Court to verify a further issue; in fact, the values underpinning it are of such significance as to render any recognition of the right to associate within a trade union that is not specifically regulated incompatible with the constitutional law itself. Indeed, whilst the imposition of conditions and limits on the exercise of that right may be optional as a matter of international law, it is instead necessary within the national perspective, so much so as to exclude the possibility of any gap within the law, a gap that would constitute an impediment on the very recognition of the right to associate within a trade union.
It is thus necessary to ascertain whether that is the position in this case, or whether the legal system contains provisions that are capable of protecting these values, pending the adoption of legislation.
16.− As regards the establishment of trade union associations, the applicable provision at this time is Article 1475(1) of Legislative Decree no. 66 of 2010 (which has not been contested), which stipulates that "[t]he establishment of associations or clubs of military personnel is subject to a requirement of prior approval by the Ministry of Defence". This is a general requirement that is applicable *a fortiori* to trade union associations, both as a *species* of the general type considered by the provision, as well as due to their particular significance.
In any case, the charters of the associations must be submitted to the competent bodies, and must be reviewed with reference to criteria that should without doubt be clarified through legislation, even though they may already be inferred from the overall constitutional framework in this area.

In this regard, a fundamental aspect is the principle of the democratic nature of the armed forces – established in general terms by Article 52 of the Constitution – which must also apply to associations of military personnel.
In another sense, that principle is also significant in relation to the perspective of the personnel affected, as persons vested with the freedom to associate within a trade union enshrined by Article 39(1) of the Constitution: that freedom can in fact only be exercised within a democratic context.
The principle of the neutrality of the entire state apparatus, provided for under Articles 97 and 98 of the Constitution, is also significant, being an essential value for the bodies charged with the "defence of the Homeland"; this too is premised on the necessary prerequisite of rigorous respect for the principle of democracy within the association.
16.1.− In order to verify whether these prerequisites have been met, it will be necessary in particular to examine the organisational structure, along with the manner of its establishment and operation; and it is superfluous to stress that the system of financing and the absolute transparency thereof are of absolute significance within those arrangements.
17.− As regards the limits on trade union action, it is necessary to recall first and foremost the exclusion of the right to strike. This without doubt entails a far-reaching encroachment on a fundamental right, which is asserted as being immediately enforceable under Article 40 of the Constitution, and has been recognised and protected at all times by this Court; nevertheless, it is justified by the need to guarantee the exercise of other freedoms that are no less fundamental and to protect interests of constitutional significance (Judgment no. 31 of 1969).
18.− As regards the further limits, on the other hand, the adoption of specific legislation is indispensable. However, in order to avoid any deferral of recognition for the right of association, and of adaptation in line with ECHR requirements, this Court holds that, pending the enactment of legislation, the gap in the law may be filled by the legislation laid down for the various military representation bodies and in particular by those provisions (Article 1478(7) of Legislative Decree no. 66 of 2010) that exclude from their competence "matters relating to the organisation, training, operations, the logistical and operational sector, hierarchical and functional relations and the deployment of personnel". These provisions in fact constitute an adequate guarantee, as things stand, for the values and interests referred to above.
19.− In conclusion, it is necessary to declare unconstitutional Article 1475(2) of Legislative Decree no. 66 of 2010, insofar as it provides that "[m]ilitary personnel may not establish professional trade union associations or join other trade union associations", rather than providing that "[m]ilitary personnel may establish professional trade union associations in accordance with the conditions and subject to the limits laid down by law; they may not join other trade union associations".
20.− The grounds for challenge relating to Article 14 ECHR are moot.

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

hereby,
declares unconstitutional Article 1475(2) of Legislative Decree no. 66 of 15 March 2010 (Code of Legislation on the Armed Forces) insofar as it provides that "[m]ilitary personnel may not establish professional trade union associations or join other trade union associations" rather than providing that "[m]ilitary personnel may establish

professional trade union associations in accordance with the conditions and subject to the limits laid down by law; they may not join other trade union associations".
Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 11 April 2018.

Annex:

Order issued at the hearing of 10 April 2018

ORDER

Having found that the following parties have intervened in the proceedings initiated pursuant to referral order no. 111 of 2017 of the Council of State: F.P. CGIL – Federazione Lavoratori della Funzione Pubblica CGIL; CGIL – Confederazione Generale Italiana del Lavoro; SILP CGIL – Sindacato Italiano Lavoratori Polizia CGIL; FICIESSE – Associazione Finanzieri Cittadini e Solidarietà; Di Natale Pierluigi and others; Dellabella Stefano and others; Bassi Attilio and others; Cappellino Piercarlo and others.
Considering that, according to the settled case law of this Court, pursuant to Article 25 of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court) and Article 3 of the Supplementary Rules on Proceedings before the Constitutional Court of 7 October 2008, the persons that were parties to the proceedings before the referring court at the time of the referral order have standing to intervene in interlocutory constitutionality proceedings (*ex plurimis*, Judgments no. 275, no. 85 and no. 16 of 2017; no. 187 of 2016 and the annexed order read out at the public hearing of 17 May 2016);
that any intervention by persons who are not parties to the main proceedings (Article 4(3) of the Supplementary Rules) is only admissible for third parties with a qualified interest that is directly related to the substantive right averred in the proceedings, and not simply governed, in the same manner as any other, by the contested provision(s) (*ex plurimis*, Judgments, cited above, no. 275, no. 85 and no. 16 of 2017; no. 187 of 2016 and the annexed order read out at the public hearing of 17 May 2016);
that this Court has stated this position on various occasions, also in relation to requests for intervention by bodies that represent collective or sectoral interests (*ex plurimis*, Order no. 227 of 2016);
that the fact that a person is party to proceedings different from those in which the referral order was made, upon which the decision of the Constitutional Court may have an influence, is also not sufficient to render that party's intervention admissible (*ex plurimis*, Judgment no. 69 of 2017 and the annexed order read out at the public hearing of 22 February 2017);
that, in the case under examination, F.P. CGIL – Federazione Lavoratori della Funzione Pubblica CGIL, CGIL – Confederazione Generale Italiana del Lavoro, SILP CGIL – Sindacato Italiano Lavoratori Polizia CGIL are not parties to the proceedings before the referring court;
that FICIESSE – Associazione Finanzieri Cittadini e Solidarietà is not a party to the proceedings before the referring court and is not vested with any interest that is directly

related to the substantive right averred in the proceedings that could legitimise intervention by it;

that Di Natale Pierluigi and others, Dellabella Stefano and others, Bassi Attilio and others, Cappellino Piercarlo and others, are not parties to the proceedings before the referring court; nor does their status as military personnel, as members of the Carabinieri or the Guardia di Finanza, vest them with any interest that is directly and immediately related to the substantive right averred in the proceedings.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares inadmissible the interventions by F.P. CGIL − Federazione Lavoratori della Funzione Pubblica CGIL; CGIL − Confederazione Generale Italiana del Lavoro; SILP CGIL − Sindacato Italiano Lavoratori Polizia CGIL; FICIESSE − Associazione Finanzieri Cittadini e Solidarietà; Di Natale Pierluigi and others; Dellabella Stefano and others; Bassi Attilio and others; Cappellino Piercarlo and others.

Signed: Giorgio Lattanzi, President