The military jurisdiction in the Italian judiciary system. (SEUL)

La giurisdizione militare nel Sistema giudiziario italiano.

(discorso tenuto dal dott. M. Block in occasione del convegno "International Symposium on Security and Military Law 2019" svoltosi a Seoul dal 3 al 5 giugno 2019)

di *Maurizio Block*[1]

Authorities, distinguished guests, good morning everyone.

It is an honor for me to have such a distinguished audience and to take part in a so high level congress concerning the military judiciary. A special thanks to the Chief of the Army Staff General Suh Wook and to the Judge Advocate General of the Republic of Korea Army Brigadier General Jonghyueng Park.

I wish to extend the warmest thanks from my Country – Italy - for the opportunity given me to speak in this important *International Symposium on Security and military law 2019* and draw the outlines of the Italian military judiciary system with particular reference to the evolution of the military Judicial system in last 50 year, thanks to which it has been possible to reach the level of independence that now the military judiciary has reached and that currently is the same as the civilian one in Italy. I think that the Italian experience can be useful also to carry out reforms in other Countries.

Traditionally, in all Countries- and Italy is no exception- military Courts have usually set up with the aim to be Courts for the Armed Forces and therefore to ensure a different justice as compared with the one administrated by the ordinary Courts: stricter rules, faster procedures, exemplar sanctions. So that the accused in military proceeding not ever enjoys the same guaranties like before ordinary Courts.

Further more judges/ prosecutors working in military Courts generally have not had the same independence granted to civilian judges and prosecutors.
This was pointed out by Clemenceau, who graphically pointed out that "military justice is to justice as military music is to music".

Consequently, the task of military Courts was not to ensure that justice was done, but rather to keep the troops in front of the enemy.

In the evolution of the legal systems - which can change obviously according to the different Countries - it happens that a nation, while imposing new rules for the Armed Forces, sets up laws also in military judiciary field, in order to grant independence to military Courts.

Such process has often entailed the abolition of military Courts in some advanced European democratic Countries like France, Germany, Portugal, Czech Republic and others.

Nevertheless, it did not happened in Italy.

The Italian Constitution adopted in 1948 after the 2nd world war, stated that Military Courts in peace time have jurisdiction only over military personnel serving who commit military crimes (art. 103 Constitution).

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I want to underline that initially the law pointed out a large meaning of the notion of "military crime" but subsequently, after the entering in force of the Constitution, for different events, the situation was reversed and the number of the military crimes resulted very limited.

The Constitution stated also (art. 102) that Jurisdictional function is exercised by ordinary magistrates established and regulated by the rules on the judiciary and that (art 108) the special jurisdiction as the military jurisdiction has the same guarantees of independence as ordinary jurisdiction.

However the guarantees granted by the Italian Constitution which came into force in 1948 were not immediately applied.

Actually a law adopted on 1941 continued to apply: the Military Court were composed by Officers from different Armed Forces (Army, Navy, Air Force) so that the military justice was admistered by judges who were not civilians but military officers.

Military Courts were chaired by a high rank officer and formed mainly by 3 officers and only one professional judge, in charge of drafting the reasons of the judgement. The Military Prosecutor Office was composed of professional magistrates which at that time wore military uniform and had a military rank: therefore they could be influenced, in some way, by the military hierarchy.

The military judiciary was not independent at that stage.

The most glaring example of the subordination can be seen in the fact that the investigating judge was under the military prosecutor and that all judges/ prosecutors were under Military General Prosecutor at the "Tribunale Supremo", apical organ of military jurisdiction, for transfers, assignments of functions and disciplinary proceedings.

The levels of the military jurisdiction were two:
Military Courts at first instance and Tribunale Supremo at second instance, that had only competence over violation of law.

In the early seventies the wearing of uniform in hearing was abolished for the professional judges and prosecutor and became compulsory the use of the gown.

Anyway, the military jurisdiction gave the idea in the opinion of the public opinion not to have sufficient guarantees of independence.

So it was felt necessary to improve the level of the autonomy and independence of military judges from the military hierarchy and to establish the equation of military judiciary and the ordinary one, according moreover with the constitutional dictate that established this principle since 1948.

The reason for this reform lay in the fact that the military defendant must be entitled to be subject to a fair trial and judged by an independent judge, free from possible pressure at the military establishment.

A new law was adopted in 1981 and stated new principles and rules to face such needs.
The Government of that time was against the abolition of military Courts and intended to keep in force them according to the choice already made by the 1948 Constitution. Consequently the 1981 Act – then merged into Military Code approved in 2010 – set up new judiciary bodies which were made independent.
As you maybe know, in my Country judges and prosecutors are the same career: in fact, even subjected to limitations aimed to ensure the impartiality of the two different functions, they can

change – for a few times – from investigating into judicial functions and the other way around dining the whole career. This rule applies also in the military jurisdiction. The 1981 Act stated that military judges and prosecutors enjoy same *status* and financial treatment as their civilian colleagues: they are civilians, do not have a military rank and wear the gown in hearing.

The panel is composed by three members: the presiding judge and a judge, both civilians, and an officer from the Armed Forces. Defendants' rights to a fair trial are assured and the same procedural rules in force for the ordinary Courts apply. Military Courts of Appeal have been introduced by the reform as Courts of second instance.

It was established that the decisions issued by the latter can be appealed before the Supreme Court of Cassation, as sole judge of legitimacy, both for military and ordinary crimes. Therefore, ordinary and military jurisdiction, which are different in first and second level, gathered in the apical degree of legitimacy before the Supreme Court; it was also established that the Office of the Military General Prosecutor is present at the Supreme Court.

Competence over promotions, transfers, disciplinary sanctions against judges/prosecutors which was taken in the previous system by the Military General Prosecutor and the Ministry of the Defense, was assigned, according to the new law, to a Self-governing Body, which, by implementing the provision of art. 108 Constitution, realizes the guarantees of the military judiciary independence as the ordinary jurisdiction: the self-governing body of Military judiciary (Council of Military Judiciary).

Currently, the Council is chaired by the President of the Supreme Court of Cassation and consists of one member elected by the Presidents of Parliament, of the Military General Prosecutor at Supreme Court and of two military judges/prosecutors elected by the colleagues: their presence ensures the participation of the Italian military judges/prosecutor body in the decisions of the Council.

There is no hierarchical relationship inside the Council.

The Presidency of the Council - given to the President of the Supreme Court - symbolizes the similarity of the ordinary and military judiciary which both now enjoy the same guarantees of independence and impartiality.

Another important event happened in 1989 when a new Code of Criminal ordinary Procedure entered into force. Military Courts came to opinion that the new common procedure had to be applied to military judicial sector. This situation accelerated the process of homogenization between the ordinary and military Courts as it led to the application also to the military accused of all the guarantees that the civilian defendant is entitled to enjoy in the ordinary proceeding (including the access to special procedure, like plea bargaining).

In 2005 the military compulsory service in Italy was abolished and the competences of military jurisdiction were consequently reduced. The number of proceedings became very low. For this reason, the number of military Courts was reduced. Currently we have:

- *3 Military Court in first level (Rome, Naples and Verona)*
- *1 Military Court in second level (Roma);*
- *Supreme Ordinary Court of Cassation;*
- *The number of military judges and prosecutor is 58 in total.*

They are civilian judges and prosecutor and no difference currently exist with the ordinary judges, as above mentioned.

For this reason, part of the public opinion thinks that military Court should be abolished because they actually have no use any longer also because Italy plans only international peace keeping or peace enforcing operations.

No more wars since 75 years in the European Union.
Moreover, the distribution of competence between military and ordinary judges is definitely irrational.

Actually, it is difficult to understand the reason why the peer degree murder is, according to the law currently in force, a common crime and, on the opposite, the murder of the superior a military crime; why the theft is a military crime but not robbery if committed by soldiers in barracks. The embezzlement is a military crime but not corruption.

Otherwise, no crimes are provided in the military criminal code aimed to punish the use or sale of drugs or sexual violence in the barracks: in fact, they are currently ordinary crimes under the competence of the ordinary Courts.

It follows that at present the military jurisdiction is fragmented and not capable to accomplish the task of repression of criminal offenses in barracks.

The reason for that lays in the fact that the military Courts are seen, in the common sense of justice, with distrust, as arrears instruments that evoke scenes of war, even if they enjoy now all the guarantees of independence as the ordinary Court and that military Courts have lost the original nature and aim which justified in the past their existence so that now part of public opinion cannot understand the scope of their continuation in force.

Actually, increasing the guarantees of independence and equalizing the *status* of military and civilian judges, the principle of specialty- that justified the keeping in force of military Courts - is not felt any longer: in other words, most people do not understand why a separate jurisdiction, that enjoys now all the characters of the ordinary one, must be still be kept in force as a separate jurisdiction with financial costs for community.

There are pressures from some Italian parties which urge the complete abolition of military Courts, or at least a reduction in one only Court, placed in Rome and responsible for military crimes committed in the international peace operations abroad.

The consequence is going to be that the ordinary Courts and the ordinary judges will be fully competent also for both military crimes committed by military personnel in the territory of the State.
The conclusion from the foregoing is, in my opinion, the following.

In any society that evolves into democracy, Courts-martial rules for themselves with the aim to accentuate the requirements of the jurisdiction: autonomy, impartiality and independence.
But when this process is going to be accomplished, the reasons for keeping in force a separate jurisdiction - that has reached at this stage the same requirements as the civilian - become incomprehensible.

Today, in my Country, the specialty of the military jurisdiction - as I said - is felt less and less for the above mentioned reasons.

The military hierarchy has the opinion that a good reason to keep in force military Courts is the shorter duration of military trials compared to the ordinary ones which are subject to long time incompatible with the needs of the military compart.

In my opinion the solutions for the future of the military jurisdiction could be the following:
1. to abolish the military jurisdiction to devolute the jurisdiction over the military jurisdiction to the common jurisdiction;

2. to enlarge the military jurisdiction by providing more military crimes composed to these in the current legal system;
3. to set up specialized military section in the frame of the common jurisdiction with a “fast track” for military crimes;
4. to set up only Military Prosecutor’s Office in first and second level with devolution to the common judiciary of the celebration of the trials.

Anyway, the fundamental and imperative need is to respect the principle of the guarantees of autonomy, independence and impartiality of the military judiciary and the rights of the accused to a fair trial.

Recently the current Government wishes to improve the competence of the military Courts setting a further number of military crimes in order to reduce also the number of the ordinary criminal proceedings.

This reform would allow to attribute utility to military Courts and to give them a useful social role. We hope that this reform will be approved even if the path will be certainly not easy.

Thank you very much for your attention.