

DECISION ON THE MERITS

Adoption: 5 July 2016

Notification: 15 July 2016

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Associazione Nazionale Giudici di Pace v. Italy

Complaint No. 102/2013

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter (“the Committee”), during its 286th session attended by:

Giuseppe PALMISANO, President
Monika SCHLACHTER, Vice-President
Petros STANGOS, Vice-President
Lauri LEPPIK, General Rapporteur
Birgitta NYSTRÖM
Karin LUKAS
Eliane CHEMLA
József HAJDU
Marcin WUJCZYK
Krassimira SREDKOVA
Raul CANOSA USERA
François VANDAMME

Assisted by Régis Brillat, Executive Secretary

Having deliberated on 15-16 March 2016, 17 May 2016 and 5 July 2016,

On the basis of the report presented by Lauri LEPIK,

Delivers the following decision adopted on the latter date:

PROCEDURE

1. The complaint submitted by the *Associazione Nazionale Giudici di Pace* (the National Association of Justices of the Peace) (“ANGdP”) was registered on 2 August 2013. It was transmitted to the Government of Italy (“the Government”) on 24 September 2013.
2. ANGdP alleges that the Italian law does not provide any social security protection for Justices of the Peace (*giudici di pace*), a category of lay judges, in violation of Article 12 (the right to social security) of the Revised European Social Charter (“the Charter”) in general, specifically in violation of Article 12§§3 and 4b of the Charter. ANGdP also alleges that there is discrimination of Justices of the Peace in matters of social security in comparison with tenured judges and other categories of lay judges.
3. On 2 December 2014, the Committee declared the complaint admissible. On 22 December 2014 the admissibility decision was communicated to the parties and the Government was simultaneously invited to make written submissions on the merits of the complaint by the time-limit of 12 February 2015.
4. On 22 December 2014, referring to Article 7§1 of the Protocol providing for a system of collective complaints (“the Protocol”), the Committee invited the States Parties to the Protocol, the States having made a declaration under Article D§2 of the Revised Charter, and the organisations referred to in Article 27§2 of the European Social Charter of 1961, to transmit to it any observations they might wish to make on the merits of the complaint before 12 February 2015.
5. No such observations were received.
6. The Government’s submissions on the merits of the complaint were registered by the Secretariat on 12 February 2015.
7. In accordance with Article 31§2 of the Rules, the President of the Committee invited the complainant organisation to submit until 23 April 2015 a response to the Government’s submissions. ANGdP’s response was registered by the Secretariat on 16 April 2015.
8. In accordance with Article 32A of the Rules, the President of the Committee invited *Unione Nazionale Italiana Magistrati Onorari* (UNIMO) and *Organismo Unitario della Magistratura Onoraria Unita* (OUMOU) to submit by 29 May 2015 observations on the complaint.

9. The observations were registered on 26 and 29 May 2015 respectively.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

10. ANGdP asks the Committee to find the situation to be in violation of Article 12 of the Charter in general, specifically in violation of Article 12§§3 and 4b of the Charter; to require the Government to reform the status of Justices of the Peace and to establish social security protection that is appropriate and proportionate to the work performed; and to require the Government to pay €2,000 of compensation.

B – The respondent Government

11. The Government asks the Committee to dismiss the complaint on the grounds that it falls outside the scope of Article 12 of the Charter in general, specifically outside the scope of Article 12§4b of the Charter; that there is no discrimination between tenured and lay judges and among lay judges; that the legislation is currently being amended to allow lay judges to benefit from social security protection.

OTHER OBSERVATIONS

A. *Unione Nazionale Italiana Magistrati Onorari (UNIMO)*

12. UNIMO calls for a legal status of lay justice that would include social security protection in line with the work performed.

13. UNIMO states that Royal Decree No. 12 of 30 January 1941 on the judiciary may allow the appointment of lay judges, even by election, to exercise any function that single judges may perform. Lay judges, who are mostly young lawyers, often abandon their professional activity to comply with rules of incompatibility and requirements of judicial efficiency. Their situation is regulated by special legislation but, according to UNIMO, the absence of any legal status of lay justice amounts to a lack of implementation of Article 106, paragraph 2 of the Constitution. Moreover, if Justices of the Peace are subject to the same obligations as tenured judges and complementing these in the administration of justice, they are not entitled to appropriate social security protection. According to UNIMO, such exclusion is discriminatory, and runs counter the general principle that employed or self-employed work must be subject to insurance coverage and contributions.

14. UNIMO considers that, when ratifying Article 12 of the Charter, Italy undertook to guarantee the effective exercise of the right to social security for all workers. It suggests to construe this provision in a progressive manner given that Italy undertook, pursuant to Article 12§3 of the Charter, to endeavour to raise progressively the system of social security to a higher level.

B. *Organismo Unitario della Magistratura Onoraria Unita (OUMOU)*

15. OUMOU joins UNIMO's call for a legal status of lay justice that would include social security protection in line with the work performed.

16. In addition, OUMOU submits that the various categories of lay judges were established to make up for flaws in the administration of justice. In 2008, there were 1,861 *giudici onorari di tribunale* (and 3,681 tenured judges in Courts of First Instance) and 1,669 *vice-procuratori onorari* (and 1,544 tenured Prosecutors), whereas 97% of criminal proceedings before a single judge were managed by *vice-procuratori onorari*. According to OUMOU, these figures show that lay judges are, beyond the assistant role they are given by the law, in fact a major pillar of the administration of justice, an importance that is not reflected by their exclusion from social security protection.

RELEVANT DOMESTIC LAW AND PRACTICE

I. Law

1. Constitution

17. The Constitution of the Italian Republic of 1 January 1948 reads as follows:

Article 102

“Judicial proceedings are exercised by ordinary magistrates empowered and regulated by the provisions concerning the Judiciary.

Extraordinary or special judges may not be established. Only specialised sections for specific matters within the ordinary judicial bodies may be established, and these sections may include the participation of qualified citizens who are not members of the Judiciary.

The law regulates the cases and forms of the direct participation of the people in the administration of justice.”

Article 106

“Judges are appointed through competitive examinations.

The law on the regulations of the Judiciary allows the appointment, also by election, of honorary judges for all the functions performed by single judges.

[...]”

Article 116

"Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige/Südtirol and Valle d'Aosta/Vallée d'Aoste have special forms and conditions of autonomy pursuant to the special statutes adopted by constitutional law.

The Trentino-Alto Adige/Südtirol Region is composed of the autonomous provinces of Trent and Bolzano.

Additional special forms and conditions of autonomy, related to the areas specified in art. 117, paragraph three and paragraph two, letter l) - limited to the organisational requirements of the Justice of the Peace - and letters n) and s), may be attributed to other Regions by State Law, upon the initiative of the Region concerned, after consultation with the local authorities, in compliance with the principles set forth in art. 119. Said Law is approved by both Houses of Parliament with the absolute majority of their members, on the basis of an agreement between the State and the Region concerned."

2. Legislation and regulations

18. Royal Decree No. 12 of 30 January 1941 on the judiciary reads as follows:

Section 1 - Judges

"Civil and criminal justice is administered by:

a) justices of the peace;

[...]"

Section 42-bis – Composition of the ordinary court

"The ordinary court is headed by the President of the court, to which other judges are assigned. One or more heads of section may be assigned to the ordinary courts.

Lay judges may be attached to the ordinary court."

19. Law No. 374 of 21 November 1991 establishing the Justice of the Peace reads as follows:

Section 1 – Establishment and functions of the justice of the peace

"1. The institution of justice of the peace is hereby established. He or she shall have jurisdiction in civil and criminal matters and a conciliation function in civil matters in accordance with the provisions of this law.

2. The justice of the peace court is presided over by a lay judge belonging to the judiciary."

Section 3 – Staff and organisational chart of the justice of the peace courts

"1. The staffing level of lay judges assigned to the justice of the peace courts is set at 4,700 positions; within that limit the organisational chart of the justice of the peace courts shall be drawn up within three months of the publication of this Law in the Official Gazette, by decree of the President of the Republic on a proposal of the Minister of Justice, after consultation of the Judicial Service Commission,.

2. In the event of a vacancy in the justice of the peace courts or of a temporary incapacity by the judge carrying out the functions thereof, the president of the court may temporarily assign the administration of the court to a justice of the peace of an adjacent court.

3. If the vacancy or incapacity exceeds six months, a new appointment shall be made in accordance with the provisions of Section 4.”

Section 4 – Admission to traineeship

“1. The president of the Court of Appeal, at least six months prior to anticipated vacancies in the organisational chart of the district justice of the peace court, or when a vacancy occurs, shall publish details of the vacant posts in the district on the Ministry of Justice website and in the Official Gazette. He or she shall also inform the Chairs of the district Bar councils. The 60-day time-limit for the submission of applications, which must include evidence of fulfilling the criteria and a declaration of there being no incompatibility as provided for by law, shall run from the date of publication in the Official Gazette. The president of the Court of Appeal shall also require the mayors of the municipalities in question to post on the municipal notice board the list of vacancies and the deadlines for the submission of applications from interested parties.

1a. Interested parties may not apply for admission to a traineeship in more than three different districts in the same year and may not specify more than six posts per district.

2. The President of the Court of Appeal shall forward the applications received to the judicial council. The latter, comprising five representatives appointed by mutual agreement by the Bar councils in the Court of Appeal district, shall draw up reasoned proposals for admission to traineeships based on the applications received and the evidence obtained.

3. The applications from interested parties and the proposals of the judicial council shall be forwarded by the president of the Court of Appeal to the Judicial Service Commission.

4. The Judicial Service Commission shall decide on the admission to traineeships, in accordance with Section 4a, of a number of applicants no greater than twice the number of judges to be appointed.”

Section 4-bis – Traineeship and appointment

“1. The lay judges sitting in the justice of the peace courts shall be appointed on the basis of the results of the traineeship period and an assessment of suitability referred to in paragraph 7, by decree of the Minister of Justice, upon a recommendation issued by the Judicial Service Commission.

2. Trainees who have been declared suitable at the end of the traineeship but who have not been appointed as lay judges in the posts open to competition, may be assigned, on request, to other vacant posts.

3. Traineeships for appointment as justice of the peace shall last for six months and shall be carried out under the direction of a supervisory judge (mentor) who shall ensure that the trainee undertakes work in civil and criminal matters in the court or with a particularly experienced justice of the peace. The traineeship shall be undertaken in the court chosen by the trainee as his or her seat.

4. The Judicial Council, pursuant to Section 4.2, shall organise and co-ordinate the traineeship in application of the instructions of the Judicial Service Commission, appointing the supervisory judges from among those serving as court judges and shall in addition organise theoretical and practical training in accordance with Section 6. The training shall also focus on the acquisition of knowledge and techniques to foster conciliation between the parties.

5. The supervisory judges shall ensure that those admitted to the traineeship shall be involved in all judicial activities, including participation in chambers, assigning to them the task of drafting the minutes of proceedings.

6. At the end of the mentoring period, the supervisory judge shall draft a report on the traineeship that has been carried out.

7. At the end of the traineeship, the Judicial Council, pursuant to Section 4.2, shall issue a decision on suitability and put forward a list of those deemed suitable for appointment as justice of the peace, based on the reports written by the supervisory judges and the results of the candidates' participation in the training courses.

8. Participants in the traineeship programme shall be paid an allowance equivalent to ITL 50,000 for each day of actual participation in the programme and shall have the costs of participation in the theoretical and practical courses reimbursed.

9. Lay judges appointed to a justice of the peace court shall take up their position within thirty days from the date of appointment."

Section 5 – Requirements for appointment

"1. The following requirements must be satisfied for appointment to the position of justice of the peace:

- a) to hold Italian citizenship;
- b) to be in possession of all civil and political rights;
- c) not to have been convicted of intentional criminal offences nor to have been sentenced to imprisonment for a minor offence and not to have been subject to preventive or security measures;
- d) to have obtained a law degree;
- e) (repealed);
- f) to be at least 30 years old and not older than 70;
- g) to have ceased, or to undertake to cease before taking up the functions of justice of the peace, the exercise of any public or private employment;
- h) to have passed the qualifying examination to practise law.

[...]"

Section 7 – Duration and renewal of the position of justice of the peace

"1. Pending the overhaul of the regulations governing the justice of the peace, lay judges fulfilling the functions of justice of the peace shall hold office for four years and may be confirmed for a second term of four years and a third term of two years. Justices of the peace whose terms of office are renewed for a further period of four years in pursuance of Section 20 of Law No. 48 of 13 February 2001, at the end of the two year term may be confirmed for a further two-year period, but must cease exercising the said functions on reaching the age of 75.

1-bis For renewal of the term of office, the upper age limit set down in Section 5.1.f shall not apply. However, the exercise of the functions of justice of the peace may not be extended beyond the age of 75.

[...]"

Section 8 - Incompatibilities

"1. The following may not serve as justices of the peace:

- a) members of parliament, members of the regional, provincial, municipal and constituency councils, members of the committees supervising the acts of local authorities, and their sections;
- b) the clergy and ministers of any religious faith;

c) anyone who holds or has held in the three years prior to appointment a managerial or executive position in political parties;

c-bis) anyone who is employed for insurance companies or banks or who has a spouse, cohabiting partner or relative up to the second degree or first-degree relatives by marriage customarily engaged in such a professional activity.

1-bis. Lawyers may not serve as justice of the peace in the district of the court in which they or their associates, spouse, cohabiting partners, relatives up to the second degree or first-degree relatives by marriage, practise law.

1-ter. Lawyers who serve as justices of the peace may not practise as lawyers before the justice of the peace court to which they belong and may not represent, assist or defend parties in proceedings before the same court, in any subsequent appeal. This prohibition shall also apply to their legal practice associates, spouse, cohabiting partners, relatives up to the second degree or first degree relatives by marriage.

[...]"

Section 10 – Duties of justices of the peace

"1. Justices of the peace must comply with the duties laid down for ordinary judges. In addition, they must not be involved, except in the cases provided for in Section 51 of the Code of Civil Procedure, in any case in which they have had or have a self-employed or partnership relationship with one of the parties.

[...]"

Section 10-bis – Prohibition of subordination or substitution

"1. Without prejudice to Section 3.2.i, justices of the peace may not be appointed, in a subordinate or substitute capacity, to other courts."

Section 11 – Allowances paid to justices of the peace

"1. The position of justice of the peace is an honorary position.

2. Lay judges serving as justice of the peace shall be paid an allowance of ITL 70,000 for each set of civil or criminal proceedings, even where there is no hearing, and for the affixing of seals, and ITL 110,000 for every other set of proceedings assigned, whether definite or struck of the list.

3. They shall also be entitled to an allowance of ITL 500.000 for each month of actual service as reimbursement for the costs pertaining to training, refresher training and payment for general institutional services. No allowance shall be paid for cases that are cancelled and subsequently resume, or for hearings held in excess of 110 a year. This number of 110 does not include those referred to in paragraph 3c below, for each of which an allowance of EUR 20 shall be paid.

3-bis. In civil matters an allowance of ITL 20,000 shall be paid for each injunction or enforcement order issued, respectively, under Sections 641 and 186b of the Code of Civil Procedure; the allowance shall be paid even where the request for an injunction is refused in a reasoned decision.

3-ter. In criminal matters justices of the peace shall be paid an allowance of EUR 10.33 for delivery of each of the following:

a) dismissal decision, referred to in Section 17.4 and Section 34.2 of Legislative Decree No. 274 of 28 August 2000, and subsequent amendments;

- b) order stipulating lack of jurisdiction, laid down in Section 26.3 and 26.4 of Legislative Decree No. 274 of 28 August 2000, and subsequent amendments;
- c) decision whereby the justice of the peace declares the appeal inadmissible or manifestly unfounded, forwarding it to the public prosecutor for the subsequent stage of proceedings, referred to in Section 26.2 of Legislative Decree No. 274 of 28 August 2000, and subsequent amendments;
- d) instruction and order in enforcement proceedings, referred to in Section 41.2 of Legislative Decree No. 274 of 28 August 2000, and subsequent amendments;
- e) procedure to amend the enforcement arrangements for home detention and community service, referred to in Section 44.1 of Legislative Decree No. 274 of 28 August 2000, and subsequent amendments;
- f) order to refer the case to the public prosecutor for further investigation, referred to in Section 17.4 of Legislative Decree No. 274 of 28 August 2000, and subsequent amendments;
- g) seizure and attachment order, referred to in Section 19 of Legislative Decree No. 274 of 28 August 2000, and subsequent amendments, and a reasoned decision rejecting the request for issuing a seizure and attachment order;
- h) decision on an objection to a prosecution order providing for the return of seized assets or rejecting the related request, referred to in Section 19.2 of Legislative Decree No. 274 of 28 August 2000, and subsequent amendments;
- i) decision on a request to re-open investigations, referred to in Section 19.2 of Legislative Decree No. 274 of 28 August 2000, and subsequent amendments;
- l) authorisation for the interception of telephone and computer or telematic conversations, or other forms of telecommunications, referred to in Section 19.2 of Legislative Decree No. 274 of 28 August 2000, and subsequent amendments, or a reasoned rejection of said authorisation.

3-quater. For the measures referred to in Section 13.5-bis, 13.8 and 14.4 of the consolidated provisions on regulations governing immigration and standards relating to the conditions of foreign national, referred to in Legislative Decree No 286 of 25 July 1998 and subsequent amendments, an allowance of EUR 10 shall be paid.

4. The amount of the allowances referred to in paragraphs 2, 3, 3-bis, 3-ter and 3-quater of this Section and in Section 15.2-bis shall be reviewed every three years, by decree issued by the Minister of Justice, in consultation with the Minister for the Treasury, the Budget and Economic Planning, in relation to the variation, certified by ISTAT, in the consumer price index for families of workers and employees observed over the previous three years.

4-bis. The allowances provided for in this Section may be combined with income derived from retirement or any other pensions.

[...]"

20. Law No. 276 of 22 July 1997 on provisions for the termination of pending civil proceedings reads as follows:

Section 8 – Legal status, allowances and social welfare rights

"1. Associate lay judges have the same legal status as lay judges.

[...]

4. The Ministry of Grace and Justice shall reimburse the entity concerned the cost of the statutory social security contributions of the associate lay judges appointed from among the lawyers registered in the relevant register; the ministry shall directly reimburse the lawyers the contributions they have paid, corresponding to their allowances, to the National Social Security and Assistance Fund.

5. The allowance referred to in paragraph 2 paid to associate lay judges appointed from among the lawyers registered in the relevant register shall be considered, for all purposes of Law No. 576 of 20 September 1980, as professional income.”

Section 9 – Removal from the register, termination of judicial duties and leave of absence

“1. Except where the appointment as associate lay judge relates to a different district from that of the headquarters of the Bar Council with which the lawyer is registered at the time of his or her appointment, an appointment as associate lay judge shall entail the removal of the said lawyer from the register of lawyers, pursuant to Section 37.1.1 of Royal Decree Law No. 1578 of 27 November 1933, converted, with amendments, by Law No. 36 of 22 January 1934. Nonetheless, he or she shall remain registered with the National Social Security and Assistance Fund for lawyers and prosecutors and the period spent as associate lay judge shall be considered as a period of professional employment for the purposes of entitlement to welfare benefits provided for in Law No. 576 of 20 September 1980, and subsequent amendments. Any reregistration on the register of lawyers shall be subject to the provision laid down in the final paragraph of Section 26 of Royal Decree Law No. 1578 of 27 November 1933, converted, with amendments, by Law No. 36 of 22 January 1934.

2. (repealed).

3. Appointment as associate lay judge shall entail the termination of judicial duties carried out as insolvency practitioner, administrator, liquidator and extraordinary commissioner, liquidator of the assets of a company in administration, administrator and legal trustee, custodian or guardian of a person deprived of legal capacity or placed under legal supervision, official assessor or asset valuer. Within fifteen days of receiving notice of appointment, associate lay judges, without prejudice to the right to remuneration for the work previously carried out, shall inform the court or authority which has appointed them of such judicial duties and the latter shall, without delay, take steps to ensure their replacement.”

21. Presidential Decree No. 917 of 22 December 1986 approving the consolidated income tax law reads as follows:

Section 50 – Income regarded as equivalent to employees’ income

“1. The following shall be regarded as equivalent to income from employment:

[...]

f) the allowances, attendance fees and other remuneration paid by the state, regions, provinces and municipalities for the exercise of public duties, and the remuneration paid to members of the tax commissions, justices of the peace and experts in the court supervising the enforcement of sentences, with the exception of those which by law must be paid to the state;

[...]”

22. Bill AS1738 of 13 January 2015 to reform lay justice reads as follows:

“13. In the exercise of the delegation provided for in Section 1.1.n, the government shall comply with the following principles and guidelines:

[...]

e) establish and regulate a welfare and assistance scheme compatible with the honorary nature of the duty, without any additional burden for the public finances, providing for the

acquisition of the necessary resources by means of deduction from the compensation and in order to give effect to the provisions of paragraph 16.e.

[...]"

"16. In the exercise of the delegation provided for in Section 1.1.q, the government shall comply with the following principles and guidelines:

[...]

e) ensure that lay judges can opt for voluntary forms of social welfare contributions, at no cost for the public finances."

23. Law No. 57 of 28 April 2016 on the delegation to the Government for the comprehensive reform of lay justice and other provisions on Justices of the Peace reads as follows:

Section 1 - Content of the delegation

"1. The government is given power to adopt, within one year from the date of entry into force of this Law and in accordance with the principles and guidelines set out in Article 2, one or more direct legislative decrees to:

a) establish a single type of lay judge, to act in a single judicial office;

[...]"

Section 2 - Principles and guidelines

"[...]

13. In the exercise of the delegation provided for in Section 1.1.n, the government shall comply with the following principles and guidelines:

[...]

l) establish and regulate a welfare and assistance scheme compatible with the honorary nature of the duty, without any additional burden for the public finances, providing for the acquisition of the necessary resources by means of deduction from the compensation.

[...]"

3. Case law

24. In Order No. 21582 of 19 October 2011, the Civil Branch, United Sections of the Supreme Court of Cassation (*Corte Suprema di Cassazione*) found that:

"4. It should first be noted that the type of judge devised by the legislature in 1991 – "mid-way between lay and professional judges having, in accordance with Section 7 of the Code of Civil Procedure, much more than negligible jurisdiction" as noted by meticulous legal theory – has assumed jurisdiction for all matters falling within the limit of claims dealt with by the small claims and district courts, and has, in addition, become involved in cases which account for a large number of civil proceedings with the primary objective of reducing the heavy workload of the professional judges, seriously compromising the credibility and efficiency of the administration of civil justice."

25. In judgment No. 4410 of 3 February 2011, the Civil Branch, 2nd Section of the Supreme Court of Cassation held that:

“1.4. Ultimately, for the reasons set out above (and the established legal principle whereby justices of the peace who exercise judicial functions after the expiry of their terms of office and pending renewal before once again obtaining tenure of office in order to undertake a further term, engage in judicial activity for which they have no jurisdiction, thereby completely nullifying the proceedings, and consequently rendering the judgment also null and void), the application must be deemed to be admissible, and the judgment at issue is declared null and void, with a referral to the Rovigo justice of the peace court – in the person of another judge – which shall also bear the costs of these proceedings.”

4. Other sources

26. The National Social Welfare Institution (*Istituto Nazionale di Previdenza Sociale*) (INPS) circular No. 67 of 24 March 2000 reads as follows:

“Pursuant to Section 8.2 of Law No. 276 of 22 July 1997, associate lay judges receive a fixed allowance and a variable allowance in accordance with the provisions adopted. In accordance with paragraph 3 of Section 8, as amended by Section 1.12 of Decree Law No. 328 of 21 September 1998, converted by Law No. 399 of 19 November 1998, the aforementioned fixed allowance “is reduced by 50% where the associate lay judge derives income from self-employment or employment, or a gross monthly pension of more than ITL 5 million”.

The problems relating to the combination or non-combination of the pension with the allowances received for exercising the functions of associate lay judge was submitted for the consideration of the Ministry of Labour and Social Welfare.

In its memorandum No. 7/60385/L.662/96 of 15 March 2000 the aforementioned Ministry stated that “from the systematic interpretation of the above-mentioned regulatory context it is clear, in the opinion of the writer, that it was the legislature’s clear intention to offer particular categories of professionals incentives to serve as associate judges.

It would not therefore be reasonable to assume that, in order to achieve that aim, provision was made for an allowance – which, moreover, is not particularly high – which would then be subject to a system whereby the said allowance could not – even if only partially – be combined with income from pensions.

Quite apart, however, from these considerations, the wording of the said paragraph 3, even if there is no specific reference to the concept of the possibility of combination, clearly defines, by virtue of the specific nature of its scope, a system that completely alters the relationship between pensions and the allowances paid to associate judges, insofar as the fixed allowance is, as mentioned above, reduced by 50%, where there is other income from employment or a pension.

Accordingly, the Ministry is of the opinion that in this instance, the general system regarding the combination with pensions and/or income should not be applied.”

Consequently, having regard to the opinion of the aforementioned Ministry, pensions must be regarded as able to be combined with the allowances provided for under Section 8 of Law No. 276 of 22 July 1997 and subsequent amendments and additions, paid to associate lay judges for the performance of their duties.”

II. Practice

27. There are six categories of lay judges in Italy:

- Private Experts in First Instance Juvenile Courts and in Juvenile Courts of Appeal;
- *Giudici onorari di tribunale* (Legislative Decree No. 51 of 19 February 1998 on rules establishing the single judge of first instance and Ministry of Justice Order of 26 September 2007 amending and integrating criteria for the appointment and confirmation of Lay Justices in Courts of First Instance);
- *Vice-procuratori onorari* (Legislative Decree No. 51/1998 and Ministry of Justice Order of 26 September 2007 amending and integrating criteria for the appointment and confirmation of Lay Deputy Prosecutors);
- Justices of the Peace (Law No. 374/91; see paragraph 19);
- *Giudici onorari aggregati* (Law No. 276/97; see paragraph 20);
- Lay Justices appointed to reduce the backlog in Courts of Appeal (Sections 63 et seq. of Legislative Decree No. 69 of 21 June 2013 on urgent provisions to relaunch the economy).

28. There were 2,080 *giudici onorari di tribunale*; 1,716 *vice-procuratori onorari*; and 1,876 Justices of the Peace in 2015.

29. Justices of the Peace are lay judges who, as members of the judiciary, administer justice and exercise civil and criminal jurisdiction (Section 1, paragraph 1, letter a) of Royal Decree No. 12/41; see paragraph 18). They also conduct civil conciliation (Section 1, paragraph 1 of Law No. 374/91). Their criminal jurisdiction mainly comprises offences prosecuted upon complaint of a victim (Sections 14 to 16 of Law No. 468 of 24 November 1999 amending Law No. 374/91 and Section 4 of Legislative Decree No. 274 of 28 August 2000 on provisions relating to the criminal jurisdiction of Justices of the Peace) and offences which may give rise to opposition to administrative sanctions up to €15 493.71 (Sections 22 and 22-bis of Law No. 689 of 24 November 1981 amending criminal justice, as amended). They also exercise full civil and criminal jurisdiction in matters of immigration (Section 10-bis of Law No. 374/91 in conjunction with Sections 13 to 17 of Legislative Decree No. 286 of 25 July 1998 on consolidated provisions governing immigration discipline and the status of foreigners, as amended). They are fully integrated in the staff and the staffing plan of the court to which they are appointed (Section 3, paragraphs 1 to 3 of Law No. 374/91).

30. Justices of the Peace are selected among lawyers between 30 and 70 years having exercised judicial functions or who have the right of audience. They are appointed by the Minister of Justice upon consultation of the Higher Council of the Magistrature (*Consiglio Superiore della Magistratura*) (CSM) after a competition based on qualifications, an internship and an aptitude test (Sections 4 to 5 of Law No. 374/91). The Supreme Court of Cassation qualifies their status as being semi-

professional, as they are entrusted with a task that is far from being negligible (Civil Branch, United Sections, Order No. 21582 cited above; see paragraph 24), and requires the aptitude test to be competitive (Civil Branch, 2nd Section, judgment No. 4410 cited above; see paragraph 25).

31. Justices of the Peace are appointed for a fixed-term of up to four years that may be extended twice pending a comprehensive reform of lay justice (Section 7, paragraph 1 of Law No. 374/91). All lay judges including Justices of the Peace whose term of office expired on 31 December 2009 were extended until 31 December 2010 (Section 1, paragraph 1 of Legislative Decree No. 193 of 29 December 2009 on urgent intervention concerning the functioning of the judicial system) and subsequently to 31 December 2011 (Appendix to Law No. 10 of 26 February 2011 converting into law, with amendments, Legislative Decree No. 225 of 29 December 2010 on the extension of deadlines set by laws and urgent action in matters of tax and support to businesses and households).

32. Justices of the Peace are subject under the threat of forfeiture of office to the same duties of impartiality, industriousness, accuracy, discretion, balance, and respect for human dignity as tenured judges (Section 10, paragraph 1 of Law No. 374/91). Moreover, the mandatory sole exercise of public duties requires them to have ceased, or undertake to stop, the exercise of any employed work, public or private (Section 5, paragraph 1, letter g) of Law No. 374/91). Also barred are persons who exercise professional activity for insurance companies and banks, or whose spouse or partner performs such activity (Section 8, paragraph 1, letter c-bis) of Law No. 374/91). Additional rules of incompatibility apply to lawyers with the right of audience (Section 8, paragraph 1-bis and 1-ter of Law No. 374/91): They may not act as Justices of the Peace within the district of the court before which they exercise; they may not represent, defend or assist parties in proceedings before the higher courts supervising the court to which they are appointed as Justice of the Peace, or where their associates or parents or spouses or partners are exercising. The CSM has extended incompatibility to work as Conciliator of the Chamber of Commerce and Ombudsman.

33. Justices of the Peace are paid a lump-sum of €258.23 per month, plus compensation with regard to the number of hearings held (€36.15 per hearing) and decisions delivered (€56.81 per judgment or equivalent decision) (Section 11, paragraphs 2 to 4 of Law No. 374/91). That remuneration may be combined with a retirement pension (Section 11, paragraph 4-bis of Law No. 374/91).

34. Law No. 57 of 28 April 2016 on the delegation to the Government for the comprehensive reform of lay justice and other provisions on Justices of the Peace (see paragraph 23) empowered the Government to reform, within one year from its entry into force on 18 May 2016, lay justice in accordance with the principles and guidelines set out in Section 2 of that Law (Section 1, paragraph 1, letter a) of Law No. 57/2016).

RELEVANT INTERNATIONAL MATERIALS

I. Council of Europe

35. The Committee of Ministers Recommendation CM/Rec(2010)12 of 17 November 2010 to member states on judges: independence, efficiency and responsibilities reads as follows:

“2. The provisions laid down in this recommendation also apply to non-professional judges, except where it is clear from the context that they only apply to professional judges.

Judicial independence and the level at which it should be safeguarded

3. The purpose of independence, as laid down in Article 6 of the Convention, is to guarantee every person the fundamental right to have decided in a fair trial, on legal grounds only and without any improper influence.

[...]

Remuneration

53. The principal rules of the system of remuneration for professional judges should be laid down by law.

54. Judges' remuneration should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions. Guarantees should exist for maintaining a reasonable remuneration in case of illness, maternity or paternity leave, as well as for the payment of a retirement pension, which should be in a reasonable relationship to their level of remuneration when working. Specific legal provisions should be introduced as a safeguard against a reduction in remuneration aimed specifically at judges.

55. Systems making judges' core remuneration dependent on performance should be avoided as they could create difficulties for the independence of judges.

[...]

36. The Explanatory Memorandum CM(2010)147add1 of 21 October 2010 to the Committee of Ministers Recommendation CM/Rec(2010)12 provides that:

“Chapter I – General aspects

Scope of the Recommendation

11. The Recommendation applies to professional and non professional judges, including judges of Constitutional courts. Provisions on recruitment, remuneration, selection and career do not relate to non professional judges. The Recommendation gives no definition of what 'non-professional judges' are as this greatly varies from a system to another, and it is a matter for the internal law of member states to decide who are considered as non professional judges for the purposes of this Recommendation, whether they are lay judges, experts appointed on the basis of their specialised knowledge, etc. Some of the provisions could be also applicable to prosecutors and other professionals acting before the courts whose status is defined by the principle of independence from the Executive or the Legislative power. Nevertheless, the Recommendation relates to judges only. The Recommendation does not apply to judges in international tribunals (Recommendation, paragraphs 1 and 2).

[...]"

II. European Union

37. By judgment of 1 March 2012 in Case No. C-393/10, *O'Brien v. United Kingdom*, the European Court of Justice (Second Chamber) held that:

"1. European Union law must be interpreted as meaning that it is for the Member States to define the concept of "workers who have an employment contract or an employment relationship" in Clause 2.1 of the Framework Agreement on part-time work concluded on 6 June 1997 which appears in the Annex to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, as amended by Council Directive 98/23/EC of 7 April 1998, and, in particular, to determine whether judges fall within that concept, subject to the condition that that does not lead to the arbitrary exclusion of that category of persons from the protection offered by Directive 97/81, as amended by Directive 98/23, and that agreement. An exclusion from that protection may be allowed only if the relationship between judges and the Ministry of Justice is, by its nature, substantially different from that between employers and their employees falling, according to national law, under the category of workers.

2. The Framework Agreement on part-time work concluded on 6 June 1997 which appears in the Annex to Directive 97/81, as amended by Directive 98/23, must be interpreted as meaning that it precludes, for the purpose of access to the retirement pension scheme, national law from establishing a distinction between full-time judges and part-time judges remunerated on a daily fee-paid basis, unless such a difference in treatment is justified by objective reasons, which is a matter for the referring court to determine."

THE LAW

Preliminary considerations

38. In its decision on admissibility (*Associazione Nazionale Giudici di Pace v. Italy*, Complaint No. 102/2013, decision on admissibility of 2 December 2014, §19), the Committee considered that the allegations made by the ANGdP raise issues under Article 12 of the Charter and indicated it would, at the merits stage, decide under which paragraph to examine the complaint.

39. The complainant organisation alleges a violation of Article 12 of the Charter in general, specifically of Article 12§3 of the Charter on the progressive raise of the system of social security to a higher level, and of Article 12§4b of the Charter on the granting, maintenance and resumption of social security rights of persons who move between the States Parties. It also alleges that Justices of the Peace are discriminated against in matters of social security, as tenured judges and other categories of lay judges such as the *vice-procuratori onorari* and *giudici onorari aggregati* are entitled to social security protection.

40. The Government rejects the applicability of Article 12 of the Charter in the present case, as Justices of the Peace are not workers within the meaning of the Charter and the complaint does not concern the population as a whole. It specifically rejects the applicability of Article 12§4b of the Charter, indicating that this provision relates exclusively to the granting, maintenance and resumption of social security rights of persons who move between the States Parties. It also contests any discrimination between tenured and lay judges and among lay judges.

41. The Committee points out that Article 12§3 of the Charter relates to the positive or negative development of a social security system. It finds, however, that the complainant organisation has presented no relevant arguments in respect of this provision.

42. It follows from the wording of Article 12§3 of the Charter that the obligation subscribed to relates to the undertaking to endeavour to raise progressively the system of social security as a whole to a higher level. This, however, is not at question in the present complaint. Moreover, the decision quoted by the complainant organisation, according to which the implementation of the Charter requires States Parties to take not merely legal action but also practical action (*International Association Autism Europe (AIAE) v. France*, Complaint No. 13/2002, decision on the merits of 4 November 2003, §53), stems from the assessment of the situation in practice, which is restricted to situations where the Committee has first considered the situation in law to be in conformity with the Charter. The present complaint, however, does not relate to the implementation of the Charter in practice, but to the conformity with the Charter of the coverage of the system and the adequacy of benefits it provides in law, that both come under Article 12§1 of the Charter.

43. Therefore the Committee considers that the complaint does manifestly not relate to Article 12§3 of the Charter.

44. The Committee recalls that, in defining the personal scope of Article 12§4 of the Charter, reference must be made to paragraph 1 of the Appendix to the Charter, which reads as follows:

“Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19.”

45. As a result, Article 12§4 of the Charter applies to nationals of the concerned State Party that have worked abroad during their life and have, on that basis, acquired or maintained social security rights under the law of that state.

46. The Committee fails to see that the arguments put forward by the complainant organisation relate to Article 12§4 of the Charter. In particular, there is no link between the exclusion of Justices of the Peace from social security and the situation of persons who move between the States Parties, the appointment as Justice of the Peace being also limited to Italian citizens in accordance with Section 5, paragraph 1 a) of Law No. 374/91.

47. Therefore the Committee considers that the complaint does manifestly not relate to Article 12§4 of the Charter.

48. The Committee recalls that the existence and maintenance of a social security system both come under Article 12§1 of the Charter. The undertaking to establish or maintain a system of social security set out in this provision is complied with (Conclusions 2002, Statement of interpretation on Article 12§§1, 2 and 3; Finnish Society of Social Rights v. Finland, Complaint No. 88/2012, decision on the merits of 9 September 2014, §§57-58) where:

- The social security system covers traditional social risks providing adequate benefits in respect of medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivors;
- A significant percentage of the population, including persons who are not in an employment relationship, is covered by health insurance, and a significant percentage of the active population is covered for income-replacement benefits such as pensions;
- The system is funded collectively.

49. The Committee notes that the complaint does not concern the material scope of the system of social security under Article 12§1 of the Charter. However, issues such as whether persons who perform the duties of Justice of the Peace should benefit from social security protection, whether they are workers within the meaning of the Charter and whether the claims of a category of workers may be examined separately from the population as a whole, in principle relate to the personal scope of this provision.

50. In this regard, whereas Article 12§1 of the Charter does not require that the entire population or active population be covered by the system of social security, it cannot be interpreted so as to exclude certain groups of the population or the active population in a discriminatory manner. The Committee therefore considers that the argument according to which persons who perform the duties of Justice of the Peace are not workers within the meaning of the Charter is not relevant.

51. The Committee notes that the complaint alleges that persons who perform the duties of Justice of the Peace are discriminated against in matters of social security in comparison with tenured judges and other categories of lay judges. Recalling that, with a view to ensuring full compliance with the substantive provisions of the treaty, it reserves the right to examine a complaint which it has previously declared admissible under certain articles under other provisions of the Charter (*Confédération française démocratique du travail* (CFDT) c. France, Complaint No. 50/2008, decision on the merits of 9 September 2009, §§19-20), it notes that the Government replied to the allegations of discrimination in its observations on the merits.

52. The Committee therefore considers that it has all the relevant items of fact and law to enable it to give a ruling, with regard to Article E in conjunction with Article 12§1 of the Charter, on whether persons who perform the duties of Justice of the Peace are discriminated against in matters of social security in comparison with tenured judges and other categories of lay judges.

ALLEGED VIOLATION OF ARTICLE E IN CONJUNCTION WITH ARTICLE 12§1 OF THE CHARTER

53. Article E of the Charter reads as follows:

Article E - Non-discrimination

“The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.”

54. Article 12§1 of the Charter reads as follows:

Article 12 – The right to social security

Part I: “All workers and their dependents have the right to social security.”

Part II: “With a view to ensuring the effective exercise of the right to social security, the Parties undertake:

1. to establish or maintain a system of social security;

[...].”

A – Arguments of the parties

1. The complainant organisation

55. ANGdP states that under Article 116, paragraph 3 of the Constitution and Section 1, paragraph 1, letter a) of Royal Decree No. 12/41, Justices of the Peace are lay judges who, as members of the judiciary, administer justice and exercise civil and criminal jurisdiction. With regard to their jurisdiction, recruitment methods, rights and duties (see paragraphs 29-33), it alleges that, unlike *giudici onorari aggregati*, a body of lay judges (see paragraph 20, 27-28) whose duties are delegated by tenured judges (Section 42-bis, paragraph 2 of Royal Decree No. 12/41, as added), Justices of the Peace exercise duties that are autonomous by nature.

56. ANGdP alleges that in practice, Justices of the Peace have proven vital to the functioning of the judiciary, as they currently oversee about 50% of all civil and 25% of all criminal trials. Moreover, since their establishment in 1991, Justices of the Peace have increasingly been assimilated to tenured judges: Their appointment follows the model for tenured judges; they are assimilated to civil servants for tax purposes (Section 50, paragraph 1, letter f) of Presidential Decree No. 917/86; see paragraph 21); their jurisdiction has gradually been extended to new matters; self-governing sections on the model for tenured judges were established in the Judicial Councils before the Courts of Appeal (Section 10 of Legislative Decree No. 25 of 27 January 2006 establishing the Governing Council of the Supreme Court of Cassation and a new discipline of Judicial Councils, as added). Quoting the Supreme Court of Cassation (Civil Branch, United Sections, Order No. 21582 quoted above) and some literature, which affirm that Justices of the Peace are semi-professional judges and that recent amendments to Law No. 374/91 professionalised them, ANGdP contends that, despite being lay judges, Justices of the Peace are in substance professional judges called to construe and apply the law on the same footing as tenured judges.

57. However, despite assigning Justices of the Peace functions akin to civil servants, the State denies them the legal status of civil servants and workers, as well as access to social security protection against the risks of age, sickness, accident, maternity and unemployment. As a result, due to the rules of incompatibility and the enormous workload, lawyers with the right of audience who perform the duties of Justice of the Peace often dedicate themselves exclusively to the work as the latter, thus suspending or reducing their professional activity below the level required for

registration with the National Social Security and Assistance Fund for Lawyers and Prosecutors (*Cassa Forense*) and the accrual of retirement annuities. Hence their duties as Justices of the Peace may *de facto* exclude them from social security protection. Moreover, whereas under Section 11-bis, paragraph 4 of Law No. 374/91, compensation paid for work as Justices of the Peace may be combined with a retirement pension, current selection criteria lowered the recruitment age to 50 years, with the effect that this provision finds no application in practice.

58. ANGdP further contends that, as Section 2, paragraph 16, letter e) of Bill AS1738 (see paragraph 22) provides that “lay judges can opt for voluntary forms of social welfare contributions, at no cost for the public budget”, no mandatory social protection is being considered.

59. As a result, Justices of the Peace are discriminated against in matters of social security in comparison with tenured judges and other types of lay judges.

60. With regard to tenured judges, such discrimination according to ANGdP runs counter to the European Court of Justice’s case-law, since “the Framework Agreement on part-time work concluded on 6 June 1997 [...] must be interpreted as it precludes, for the purpose of access to the retirement pension scheme, national law from establishing a distinction between full-time judges and part-time judges remunerated on a daily fee-paid basis, unless such a difference in treatment is justified by objective reasons, which is a matter for the referring court to determine” (European Court of Justice (Second Chamber), Case No. C-393/10, *O’Brien v. United Kingdom*, judgment quoted above; see paragraph 37). Also, whereas Committee of Ministers Recommendation CM/Rec(2010)12, referring to the right of all judges to get a pension proportionate to the earnings gained while in service, should according to ANGdP apply to tenured and lay judges alike, the prohibition on the remuneration on a piecework basis (§§54-55; see paragraph 35) is implemented for tenured judges, but not for Justices of the Peace.

61. With regard to other types of lay judges, ANGdP claims that Justices of the Peace do not enjoy social security protection, as *giudici onorari aggregati* do. Indeed, the compensation paid to them is professional income on the basis of which the Ministry of Justice must reimburse the social security contributions due to the *Cassa Forense* for pension purposes (Section 8, paragraphs 4 and 5 of Law No. 276/97), and the INPS has admitted the combination of the compensation paid to *giudici onorari aggregati* and these contributions (INPS circular No. 67 of 24 March 2000; see paragraph 26). Further, the Court of Turin has ordered the INPS to enrol ten *vice-procuratori onorari* with the *Cassa Forense*, and the Ministry of Justice to pay the corresponding contributions (Ordinary Court of Turin, Labour Section, 5th Section, case No. 10697/2013, judgment of 7 July 2014, merits).

2. The respondent Government

62. The Government submits that Article 116, paragraph 3 of the Constitution quoted by the complainant organisation does not grant legal status to Justices of the Peace, but only distributes the legislative competence in matters related to lay justice between the State and the Regions. The Constitution makes clear that, whereas judicial functions are at the outset exercised by tenured judges (Article 102, paragraph 1 of the Constitution), they may also be exercised by lay judges (Article 106, paragraph 2 of the Constitution), under circumstances laid down by Royal Decree No. 12/41 and special legislation on different statuses in lay justice.

63. Moreover, the alleged lack of implementation of pension rights for Justices of the Peace by Section 11, paragraph 4-bis of Law No. 374/91 results from a misunderstanding, as this provision only allows for Justices of the Peace to keep, while working as lay judges, the remuneration from their professional activity or old age pension.

64. In addition, Section 2, paragraph 13, letter e) and paragraph 16, letter e) of the Bill AS1738 provides for social security protection on the basis of voluntary contributions, given that lay judges perform honorary work. According to the Government, this will allow these judges, including Justices of the Peace, to benefit from social security protection.

65. The Government denies the relevance of Article 12 of the Charter in general, as Justices of the Peace are, in its view, not workers within the meaning of the Charter. Moreover, the complaint is limited to the lack of social security protection for Justices of the Peace, and does not concern the lack of such protection for the population as a whole.

66. It specifically denies the relevance of Article 12§4b of the Charter, as this provision relates exclusively to the granting, maintenance and resumption of social security rights when persons move between States Parties.

67. With regard to the alleged discrimination in comparison with tenured judges, the Government submits that lay judges are different in the following respects:

- They are selected on the basis of their qualifications and not on the basis of written and oral examination;
- They are appointed for a fixed term, which for Justices of the Peace is four years, renewable twice, subject to a positive assessment of performance; an exceptional renewal until 31 December 2015 was provided by Section 2-bis of Law No. 15 of 27 February 2014 on the conversion into law, with amendments, of Legislative Decree No. 150 of 30 December 2013 providing for the extension of deadlines set by law, to allow Parliament to reform lay justice;

- They work part-time and have another professional activity, mostly as lawyers with the right of audience before the courts, retired employees or professionals, the aim being to give lawyers access to a honorary and prestigious function;
- They exercise judicial functions not in the framework of an employment relationship (*rappporto di lavoro*), but under a honorary service relationship (*rappporto di servizio*), fully regulated by Law No. 374/91; hence there is neither collective nor individual agreement with the State, their workload solely depends on the amount of disputes pending, and they have autonomy to organise their work;
- Given the honorary nature of their service, they are paid no salary, but a compensation, determined by Law No. 374/91; that compensation may be cumulated with an old age pension; the assimilation of the compensation to wages under Section 10, paragraph 1, letter f) of Presidential Decree No. 917/86 alleged by the complainant organisation being restricted to tax purposes;
- For the same reasons, they have neither right to leave nor to enrol in social security as they enjoy coverage through their professional activity or pension.

68. It argues that, as the differences in legal status between tenured and lay judges reflect differences in nature of their respective functions, there is no discrimination between them. Also, as Justices of the Peace are not workers but persons appointed temporarily for the lay exercise of judicial functions, they may not be tenured or labelled professionals. Moreover, paragraph 2 of Recommendation CM/Rec(2010)12 establishes a distinction between lay and tenured judges as its provisions are excluded where it is clear from the context that they apply to tenured judges only. Indeed, whereas provisions concerning the independence of judges (§3) should apply to Justices of the Peace, those on remuneration, social security, pension, leave (§§53-55) should apply to tenured judges only, as they are aimed at protecting a category of workers who exercise judicial functions in a stable, continuous and exclusive manner. According to the Government, §53 refers to the remuneration of tenured judges only, and the Explanatory Memorandum (see paragraph 36) makes it clear that provisions on recruitment, remuneration, selection and career development do not apply to lay judges.

69. With regard to *giudici onorari aggregati*, who allegedly enjoy social security protection whereas Justices of the Peace do not, the Government refers to a misunderstanding: When Parliament passed the extraordinary recruitment of 1 000 *giudici onorari aggregati* to remove the backlog pending before the Courts of First Instance, enrolment with social security was provided for (Section 8, paragraph 4 of Law No. 276/97) because the exercise of judicial functions was made incompatible with any other professional activity or employment (Section 9, paragraphs 1 and 3 of Law No. 276/97).

B – Assessment of the Committee

70. The Committee recalls that the insertion of Article E into a separate provision indicates the heightened importance paid to the principle of non-discrimination with respect to the achievement of the various substantive rights contained in the Charter. Its function is to help secure the equal effective enjoyment of all the rights concerned. The principle of equality that is reflected therein means treating equals equally and unequals unequally. Article E of the Charter not only prohibits direct discrimination but also all forms of indirect discrimination that may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all. The grounds of prohibited discrimination listed in Article E of the Charter are not exhaustive (*International Association Autism Europe (IAIE) v. France*, Complaint No. 13/2002, decision quoted above, §§51-52).

71. The Committee also recalls that States Parties enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. However, it is ultimately for the Committee to decide whether the difference lies within this margin (*Confédération française démocratique du travail (CFDT) c. France*, Complaint No. 50/2008, decision quoted above, §39).

72. A distinction is discriminatory with regard to Article E of the Charter where it lacks objective and reasonable justifications, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (*European Roma Rights Centre (ERRC) v. Bulgaria*, Complaint No. 31/2005, decision on the merits of 18 October 2006, §40).

73. The Committee recalls that in matters of discrimination, the burden of proof should not rest entirely on the complainant, but should be the subject of an appropriate adjustment (*Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, Complaint No. 41/2007, decision on the merits of 3 June 2008, §52).

As to comparability

74. The Committee notes that pursuant to Section 1, paragraph 1 letter a) of Royal Decree No. 12/41, Justices of the Peace are lay judges who, as members of the judiciary, administer justice and have jurisdiction in civil and criminal matters. It recalls that the situation of persons who perform the duties of Justice of the Peace must be examined, not with regard to their legal status or labelling under domestic law, but in an autonomous manner and depending on the duties assigned; hierarchical authority; and tasks performed, the latter being determinant in this regard (*European Council of Police Trade Union (CESP) v. France*, Complaint No. 101/2013, decision on the merits of 27 January 2016, §§54-59). It notes that the Justices of the

Peace's mission is to contribute to the administration of justice and to exercise jurisdiction. Their similarities with tenured judges have increased with regard to recruitment; jurisdiction; income taxation; and with their budgetary and personal management, to the extent that the Supreme Court of Cassation (Civil Branch, United Sections, Order No. 21582 quoted above) describes them as judges who are "mid-way between lay and professional judges". They are fully integrated in the civil and criminal court staff under the 2014 Performance Plan established by the Department of judiciary organisation, personnel and services in the Ministry of Justice.

75. Considering the duties assigned, the tasks performed and their integration within the judiciary, the Committee finds that persons who perform the duties of Justice of the Peace are functionally equivalent to tenured judges with regard to Article 12§1 of the Charter, regardless of whether Justices of the Peace are termed professional or lay judges under domestic law.

76. The Committee notes that Recommendation CM/Rec(2010)12, whose provisions also apply to non-professional judges, except where it is clear from the context that they do not apply to them (§2), recommends maintaining a reasonable remuneration in case of sickness, maternity or paternity leave, as well as paying a retirement pension which should be in a reasonable relationship to the level of remuneration (§54).

As to the existence of differential treatment

77. The Committee notes that persons who perform the duties of Justice of the Peace do not constitute a homogeneous category with regard to social security. In practice, they may enjoy social security under a pension scheme, an employment contract, or a self-employed professional activity. It cannot be disregarded that, for reasons of legal incompatibility, needs of the courts or even personal choice, some persons who perform the duties of Justice of the Peace suspend or reduce their professional activity beyond the level required for registration with the *Cassa Forense* or for the accrual of retirement annuities.

78. However, as Law No. 374/91 neither prescribes any social security coverage on the basis of honorary activity, nor does it verify effective alternative social security coverage, some persons who perform the duties of Justice of the Peace as a main activity and suspend or reduce their professional activity could find themselves to be precluded from social security coverage. Since Law No. 374/91 allows persons who exercise the duties of Justices of the Peace to exercise these duties as a main activity, and to keep secondary their professional activity, a situation which tenured judges and other categories of lay judges such as the *giudici onorari aggregati* are prevented from by their legal duty to the sole exercise of public duties and to enrol with social security, that Law creates differential treatment with regard to social security.

79. The Committee notes that the Government does not deny the existence of such differential treatment. It also notes that Section 2, paragraph 13 letter e) and paragraph 16 letter e) of Bill AS1738, by prescribing a possibility for lay judges to subscribe to voluntary social security coverage, initially recognises a possible need for such coverage on the basis of honorary activity.

80. Recalling that within the scope of the collective complaints procedure, it rules on the legal situation prevailing on the day of its decision on the merits of the complaint (European Council of Police Trade Unions (CESP) v. Portugal, Complaint No. 57/2009, decision on the merits of 1 December 2010, §52), the Committee takes note that Section 2, paragraph 16 letter e) of Bill AS1738 and the possibility to subscribe to a voluntary social security coverage has been suppressed in subsequent Law No. 57/2016. The Government is now empowered to adopt regulations within one year from 18 May 2016 to establish and regulate a welfare and assistance scheme that meets the terms set out in Section 2, paragraph 13 letter l) of that Law No. 57/2016.

81. The Committee finds that, where persons who perform the duties of Justice of the Peace enjoy social security coverage under a pension scheme or an employment contract, the differential treatment may not affect their right to social security under Article 12§1 of the Charter. However, the Government has not established that all persons who perform the duties of Justice of the Peace do enjoy social security coverage in practice, including where these persons suspend or reduce their professional activity beyond the level required for registration with the *Cassa Forense* or for the accrual of retirement annuities.

As to the justification for the differential treatment

82. The Government puts forward a series of grounds to justify the differential treatment, in particular the selection procedure, the fixed term in office, part-time work, honorary service or remuneration by compensation and the fact that persons who perform the duties of Justice of the Peace are appointed as service providers while tenured judges and the other categories of lay judges such as the *giudici onorari aggregati* perform their duties in a stable, continuous and exclusive manner. The Committee considers that these arguments concern mere modalities of work organisation and do not constitute an objective and reasonable justification of the differential treatment of persons whose functional equivalence has been recognised.

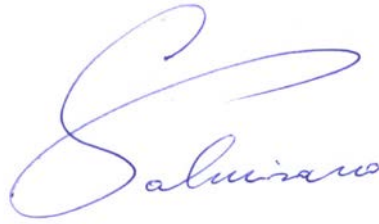
83. Consequently, the Committee holds there is a violation of Article E read in conjunction with Article 12§1 of the Charter in respect of persons who perform the duties of Justice of the Peace and who have no alternative social security coverage.

CONCLUSION

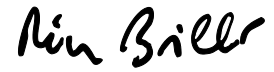
For these reasons, the Committee concludes unanimously that there is a violation of Article E in conjunction with Article 12§1 of the Charter.



Lauri LEPPIK
Rapporteur



Giuseppe PALMISANO
President



Régis Brillat
Executive Secretary