EXERCISE OF THE RIGHT TO STRIKE IN SLOVENIA: ON SOME CONTROVERSIAL ISSUES AND COMPLIANCE WITH THE EUROPEAN SOCIAL CHARTER

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The point of departure of this paper is that, in Slovenia, the implementation of the Strike Act, which was adopted still in former Yugoslavia requires profound changes as it is not in line with the constitutional concept of the right to strike or with the basic approaches of international norms and/or the interpretations of these norms made by the relevant supervisory bodies. The focus is placed exclusively on the European Social Charter and its supervisory body – the European Committee of Social Rights. The author briefly comments on certain (inadequate) solutions in the domestic legal regime and its implementation. She indicates possible changes de lege ferenda following the interpretations of the European Social Charter, derived from the case-law of the European Committee of Social Rights. Special attention is drawn to the inadequate legislation which determines limitations to the right to strike of workers in state bodies and public services.

Key words: the Strike Act, the European Social Charter, principles of necessity, adequacy and proportionality, limitations

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1. INTRODUCTION

I feel highly honoured to be able to dedicate this modest contribution to Prof. Željko Potočnjak on the occasion of his anniversary. I chose to write about the right to strike given that we have both dealt with this topic in the past. Our professional paths began to cross in former Yugoslavia, when we participated as assistants in regular annual meetings of our departments, organized alternately by the Yugoslav faculties of law. Over the last 30 years, we would usually meet at international conferences and congresses, and it is quite ironic to find that we had to travel to different parts of the world to meet and to be able to exchange views on individual labour law issues in our countries.

In Slovenia, there are no accurate data on the number and types/forms of strikes. There are general estimations that, while the number of strikes has started to decline since 2010, we are still facing some high-profile strikes, particularly in the public sector. For example, if we were to draw conclusions from case-law, the question of strikes does not pose a particularly pressing labour law issue. I do not share that opinion. I am among those who are convinced that there is a considerable degree of ambiguity and shortcomings with regard to the regulation and practice of the right to strike. That is why we should pay more attention to strikes. There are many reasons for this. Let me mention but a few. From the point of view of principle, concept and drafting, I see the biggest problem in the mere statutory regulation of the constitutional right to strike. In Slovenia, the Strike Act (ZStk)[1], which was adopted in former Yugoslavia, has not yet been replaced by a more appropriate and up to date Slovenian act.[2] This, in fact, means that the overhaul of the labour law system from the days of social ownership, which started in the 1990s, has not yet been completed.[3]

Moreover, for some purely formal problems, the existing dilemmas regarding the compliance of the current legal regime with the binding international norms cannot be ignored. When determining the conceptual starting positions

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1 Ur. L. SFRJ, no. 23/1991 (Official Gazette of the SFRJ, No 23/1991).

2 The act is applied *mutatis mutandis* in the Republic of Slovenia as a Republic Act on the basis of the Fundamental Constitutional Document on the Autonomy and Independence of the Republic of Slovenia; a special decree of the Assembly of the Republic of Slovenia has given its consent for its provisional application until a new law is adopted (Official Gazette of the RS No 22/91). However, such a law has not yet been adopted.

3 I drew attention to this fundamental legal issue back in 2007: More on this: Končar, P., *O stanju na področju kolektivnega delovnega prava (On the State of Collective Labour Law)*, Podjetje in delo, no. 6-7, 2007, pp. 1238-1246.

regarding the right to strike, the Constitution of the Republic of Slovenia and the statutory system based thereupon must take into account the binding international norms and their interpretation by the competent supervisory authorities. In our case, the issue of compliance of domestic law with international law concerns a series of issues to which we should *de lege ferenda* pay particular attention if we wish to remedy the deficiencies of the current regulation regarding the right to strike. The questions to be answered are the following: 1. do the Constitution of the Republic of Slovenia and other sources of law take due account of the conceptual foundations of international norms[4], 2. do we follow international legal regulation relevant from the point of view of the right to strike[5] in the interpretations of the relevant Constitutional provisions, 3. is the statutory regulation consistent with the Constitution[6], 4. is the sectoral

[4] In this context, the current topic in Slovenia is the question of the criteria for limiting organizational freedom as an element of trade union freedom and the constitutional right to strike. Another important issue is the admissibility of restricting the right to strike by an autonomous act and not just by law. According to the constitutional provision, the doctrine that a strike can only be restricted by law if a public benefit so requires, rejects the possibility of restricting the right to strike by means of collective agreements. The arguments put forward should also apply in the case of 'strike rules', which may otherwise be contested for other reasons. For more on autonomous sources relating in whole or in part to strike see: Kresal Šoltes, K., *Vsebina kolektivne pogodbe: pravni vidiki s prikazom sodne prakse in primerjalnopravne ureditve (Content of the Collective Agreement: Legal Aspects with a Presentation of Case-law and Comparative Regulation)*, GV Založba, Ljubljana, 2011, pp. 152-154; Debelak, M., *Aktualna vprašanja pravne ureditve stavke v Republiki Sloveniji-II (Current Questions of the Regulation of Strike in the Republic of Slovenia-II)*, Delavci in delodajalci, no. 4, 2005, pp. 535-570.

[5] In the case-law of the Constitutional Court and other courts, the substantive and functional coherence of Article 76 (union freedom) and Article 77 (the right to strike) of the Constitution of the Republic of Slovenia is overlooked. Among the more recent judgments see judgment U-I-289/13, 10. 3. 2016, (ECLI:SI:USRS:2016:U.289.13). Končar, P., *On Restriction and Deprivation of the Right to Strike in Relation to Article 77 of the Constitution of the Republic of Slovenia (O omejevanju in odvzemu pravice do stavke v zvezi s 77. členom Ustave RS)*, in: Senčur Peček, D. (ed.), *Teorija in praksa, pravo in življenje: Liber amicorum Etelka Korpič-Horvat (Theory and Practice, Law and Life: Liber amicorum Etelka Korpič-Horvat)*, Univerzitetna založba Univerze v Mariboru, Maribor, 2018, pp. 109-119.

[6] There are doubts as to whether a sufficiently restrictive approach is taken to restrictions of the right to strike as required by international norms. There are concerns about the regulation of strikes in the public sector and in state bodies, which do not comply with international regulation and the Constitution, that the decisive criterion for any restriction of the right to strike must be a public benefit. For more on this see: Debelak, M., *Problematika izvajanja zakona o stavki (Problems regarding*

legislation governing strike in accordance with the Strike Act, the Constitution of the Republic of Slovenia and international norms.[7]

It is interesting that there are no direct demands from the social partners, especially trade unions, for a new legislation on strikes, although, on the other hand, at least some of them have acknowledged in informal discussions that the deficient regulation of certain substantive and procedural issues in the implementation of the legal regime in force raises a number of problems. In this paper, I will focus on certain selected issues related to the very essence of strike and on those brought to our attention by experts on the basis of examples from the case-law of the Constitutional Court and the relatively modest case-law of other courts. In view of the efforts made towards consistent regulation compliant with international law, we must take into account the various ratified international norms/treaties that are relevant to strike. In this paper, I shall focus on the European Social Charter (hereinafter: ESC or Charter) as the first international treaty which has recognized the right to strike. In doing so, I shall take into account certain interpretations of the Charter by the European Committee on Social Rights (hereinafter: the ECSR or the Committee). As a contracting party, we are bound not only by the treaty itself but also by the interpretations of the Committee intended to direct the states parties to understand and implement the Charter correctly.

2. ON CERTAIN DISPUTABLE ISSUES OF REGULATION AND CASE-LAW OF THE RIGHT TO STRIKE AND THEIR COMPLIANCE WITH THE EUROPEAN SOCIAL CHARTER

2.1. Definition of a strike

According to Article 1/1 of the Strike Act, a strike is defined as an organized *interruption* of work performed by workers for the purpose of exercising economic and social rights and interests related to work. While the definition is consistent with the Constitution of the Republic of Slovenia, which classifies the right of workers to strike as a constitutional right, there are also some concerns that the legal definition, at least from the point of view of the ESC is at the same time too broad and too narrow.

We can speak about a broad concept of strike because the ZStk defines a strike as "an organized interruption of work performed by workers for the

Implementation of the Strike Act), Delavci in delodajalci, no. 2-3, 2018, pp. 351-366.

7 The dilemma is related to the fact that numerous acts in the field of public services do not take into account the demand for a very restricted right to strike.

purpose of exercising the *economic and social rights and interests relating to work*". The Charter, for example, provides for the right to strike only for interest-based disputes, that is to say, for issues which may be the subject of collective bargaining[8] and not for disputes over conflicts of rights.[9] Article 6/4 of the Charter reads as follows:

"With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."

It is important to bear in mind here that differences in the determination of the purpose of a strike as regulated in the Charter are conditional on the right to strike being recognized in the context of the right to collective bargaining. The strike is expressly mentioned as one of the forms of collective action by two parties involved in collective bargaining, that is to say, not only workers but also employers. This, in turn, raises the topical issue of the possible regulation of the *right to lock-out*.

In Slovenia, the legal regime in force does not cover the right to lock-out. It could be considered that the regulation is narrower in comparison to the Charter. Some do not believe that it is in compliance with the Charter. Taking into consideration interpretations of the Charter, such a standpoint is, in my view, questionable. Although the Charter does not expressly mention the right to lock-out, the ECSR explained as early as 1969 that Article 6/4 of the Charter applies to both strikes and lock-outs. The Committee came to this conclusion because "a lock-out is the principal, if not the only, form of collective action which employers can take in the defense of their interests".[10] The Committee's aforementioned position is probably the reason why some are in favor of legal recognition and the regulation of the right to lock-out also in Slovenia.[11] However, they have obviously overlooked the more recent Interpretative Statements on Article 6/4, in which the Committee additionally clarified:

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8 Generally speaking, conflicts which concern the conclusion or modification of a collective agreement.

9 Conflicts related to the existence, validity or interpretation of a collective agreement and to violation of a collective agreement.

10 Conclusions I (1969), Statement of Interpretation of Article 6/4.

11 In 2009 a new Strike Act proposal was drafted which also contained provisions on lock-out. It received considerable criticism from professionals and never went into parliamentary procedure. See e.g. Debelak, M., *Pravna ureditev stavke de lege ferenda (Legal Regulation of the Strike de lege ferenda)*, Delavci in delodajalci, no. 1, 2010, pp. 29-50.

"A general prohibition of lock-out is not in conformity with Article 6/4."[12]

"The Charter does not necessarily imply that the legislation and case-law should establish full legal equality between the right to strike and the right to call a lock-out."[13]

Consequently the Committee thought, in the first place, that a state party to the Charter cannot be found at fault for not having passed legislation regulating the exercise of lock-out and, in the second place, that the competent tribunals were entitled to place certain restrictions on the exercise of lock-out in specific cases where it would in particular constitute an abuse of the right or where it would be devoid of justification on the ground of "force majeure" or of "the disorganization of the enterprise caused by the workers´ collective action". This means that a Contracting State is not obliged to recognize or regulate the right to lock-out. It will, therefore, be interesting to see what expert arguments will be put forward by the supporters of this institution in the event of the legalization of the right to lock-out in Slovenia.

Finally, let me draw attention to another narrowly defined element of (legitimate) strike, stemming from the legal definition of a strike, which is occasionally the subject of professional discussions on its (non)relevance. It is also the reason to ask ourselves whether we need a statutory definition at all.[14] The point is that the legislation in force defines a strike as an organized interruption *of work* (in the sense of termination of work by workers). From the aspect of strict legal formality, such a definition does not take into account newer forms of strike such as slowing down work, work to rules, sit-down or white strikes, successive strikes, overtime ban, etc., known in our practice. In these cases, workers, as a rule, do not interrupt or stop work. It is possible to agree with those who believe that, in our situation, we need a definition of a strike. The question remains whether all forms of strike or any new trends in the evolution of future strikes could be subsumed under the definition. In any case, it will be necessary to consider whether the law should explicitly provide for a solidarity strike.

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12 Conclusions I (1969), Statement of Interpretation of Article 6/4.

13 Conclusions VIII (1984), Statement of Interpretation of Article 6/4.

14 Comparative legal analyses show that strike is not legally defined in some countries (e.g., Austria, Finland, Germany, Hungary, Israel, Italy, the Netherlands); its current concept has been developed by the courts. Waas, B. (ed.), *Right to strike, A Comparative view,* Wolters Kluwer, Law and Business, 2014, pp. 3-5.

2.2. Bearers of the right to strike and strike organizers

Under Article 77 of the Constitution of the Republic of Slovenia and Article 2 of the Strike Act, the bearers of the right to strike are workers. Quite often the question is raised as to who is considered to be a 'worker'. So far, as a rule, only persons in a dependent employment relationship have been considered 'workers'. Nowadays, however, changes in the organization of work have led to new forms of work where persons carrying out the work do not work on the basis of a contract of employment, meaning that they do not formally have the status of an employed dependent worker.[15] Everyday practice indicates that they work in poor working conditions "and that they should be given at least limited legal employment protection, which should also include the right to organize and to collective bargaining and the right to strike."[16] This position poses a considerable challenge from the point of view of the development of labour law, as the question remains open how to formally extend the said protection to persons, irrespective of their status at work. Different ways are possible.[17] However, there are also different views as to whether we can refer to international law when seeking an answer as to who should be regarded as a worker to whom the mentioned rights apply. This specifically pertains to interpretations of ILO Convention No 87 on Freedom of Association and Protection of the Right to Organize. What I have in mind is the view[18] that, with

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15 The so-called self-employed and platform workers.

16 See: World Employment and Social Outlook 2021, *Rapid growth of digital economy calls for coherent policy response Press release*, 23 Febr. 2021, https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_771909/lang-en/ind; Kresal Šoltes, K., *Nestandardne oblike dela in kolektivne pogodbe, (Non-standard Forms of Work and Collective Agreements)*, Delavci in delodajalci, no. 2-3, 2018, pp. 256-260; Kresal, B., *Delo prek spletnih platform, (Work through online Platforms*), in: Kresal Šoltes, K.; Strban, G.; Domadenik P. (eds.), *Prekarno delo: multidisciplinarna analiza (Precarious Work: Multidisciplinary analyses)*, Faculty of Law, Faculty of Economics, University of Ljubljana, Ljubljana 2020, pp. 119-121.

17 Protection could be provided, for example: 1. by a new definition of the concept of worker in the general statutory regulation on employment relationships 2. by explicit statutory recognition (labour law, special/sectoral law governing the status of only a particular group of persons) of certain rights which workers with employment contracts have, including persons engaged in independent work, 3. by amending the interpretation of the concept of worker.

18 Dr. Katarina Kresal Šoltes is particularly committed to this position. See e.g., Kresal Šoltes, K., *Nestandardne oblike dela, prekarnost in dostop do sindikalnega izobraževanja in kolektivnega pogajanja (Non-standard Forms of Work, Precarity and Access to Trade Union Association and Collective Bargaining*), in: Senčur Peček. D. (ed.) *op. cit*. (fn. 5), pp. 182-184.

regard to trade union freedom and the right to strike, ILO Convention No 87 is the international source which in itself refers directly to a broader concept of worker (not only a worker having an employment contract), since its Article 2 states that "workers and employers, *without distinction whatsoever*, shall have the right to establish and, subject only to the rules of organization concerned, to join organizations of their own choosing without previous authorization". According to the interpretations of the pertinent ILO supervision bodies the prohibition of discrimination (the wording "without distinction whatsoever") applies to employed persons in both the private and the public sector, to all branches, irrespective of occupation, sex, race, religion, etc. It is questionable whether one can use the term "worker" in a broad sense on the basis of Convention No 87 and the interpretation that the prohibition of discrimination under the Convention should apply to all those who carry out work, irrespective of their legal status at work. As regards the dilemma as to who can be recognized as a bearer of the right to strike, I share the view of Prof. Potočnjak, who maintained that it would be appropriate to assess the situation on the person's actual economic and social status (strikers have no real economic or legal power in relation to the opposing party). The assessment should not depend exclusively on the formal legal status of the worker (work on the basis of the employment contract).[19]

From the viewpoint of a strike, changes regarding the term "worker" and/or the question which persons should, at least in part, be recognized the rights that workers in an employment relationship enjoy, constitute a significant intervention into the present concept of the right of workers to strike.

The right to strike must be distinguished from the right *to call a strike*. The practice in Slovenia shows that the bearers of the right to strike are generally not the ones that call a strike. Although the Strike Act contains provisions on who may call a strike, the regulation is in some respects controversial or at least incomplete. The Strike Act in the first place sets out trade unions as permissible "organizers" of a strike; workers, who are actually bearers of the right to strike, are mentioned only in the second place. Apart from that, doubts about the constitutionality of the Strike Act are also based on the idea that workers can only call a strike in 'an organization, part of an organization or at an employer'[20]; outside that framework the strike can only be called by the sectoral trade union or a trade union organized at the state level. The legal

[19] Prof. Potočnjak drew attention to the issue back in 1992. See: Potočnjak, Ž., *Pravo na štrajk, (The Right to Strike)* Faculty of Law in Zagreb, SSSH, Zagreb, 1992, pp. 17-20, 270-271.

[20] Article 2/3 of the Strike Act.

regulation should be based on Article 77 of the Constitution of the Republic of Slovenia, according to which the bearers of the right are workers. The right to call a strike is actually linked to the right to organize and the freedom of trade union activity as its constituent component (Article 76 of the Constitution of the Republic of Slovenia). There is a substantive and functional connection between Articles 76 and 77 of the Constitution of the Republic of Slovenia, which is, unfortunately, overlooked in constitutional court adjudication.[21]

What is missing in the current legislation are provisions on the relationship between workers and the trade union(s) calling a strike[22] and/or a clear regulation of the possible participation of workers in the strike in case they are not members of the strike "organizer(s)".[23] Case-law also indicates that there are ambiguities as to the role of the strike committee vis-à-vis the strike "organizer" and its status in resolving the collective dispute.[24]

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21 See, for example, the decision of the Constitutional Court of the Republic of Slovenia U-I-289/13, 1.3.2016 (ECLI:SI:USRS:2016:U.289.13): The case refers to the proceedings to review the compliance of Article 99 of the Defense Act (Zakon o obrambi, Ur.l. RS, no. 103/04, 95/15) with Articles 77 and 76 of the Constitution of the RS. Article 99 of the Defense Act in force at that time provided that military personnel do not have the right to strike during the performance of military service. Much attention was paid by the Court to the fact that military service comprises a specific set of tasks, civic tasks in peacetime included, which have to be performed continuously due to the constitutionally determined duty to defend the state (e.g., Article 123). It was of the opinion that the challenged statutory provision was not inconsistent with Article 77 of the Constitution. It is regrettable that the Court did not refer to Article 76 or clarify the relationship between Article 76 (not providing any limitation of subjective or objective nature) and Article 77 of the Constitution of the RS. One should take into account that the right to strike is not the only and independent constitutional right but also an essential element of the freedom of association.
For diverse observations concerning the legal regime and practices at issue see: Debelak, M., *Problematika izvajanja zakona o stavki (Problems regarding the implementation of the right to strike)*, Delavci in delodajalci, no 2-3, 2018, pp. 351-368; Končar, P., *op. cit*. (fn. 5), pp. 110-119.

22 In particular, it is a question of the participation of workers in decision(s) on the declaring/commencement of a strike when the strike is called by a trade union.

23 In some countries, there is a clear distinction between the bearers of the right to strike and the participants in a strike.

24 According to the Higher Labour and Social Court, the strike committee cannot be granted the status of a participant in a collective labour dispute because it does not fulfil the conditions: it is a special body whose function effectively ceases when the strike is ended and does not have the right to call a strike (Judgment and Order of the Higher Labour and Social Court Pdp 791/2006, 17 May, 2007).
The Supreme Court of the Republic of Slovenia, however, has ruled that the respon-

As regards the ESC and the issues related to groups entitled to call a collective action/strike, the ECSR points out that the decision to call a strike can be taken only by a trade union provided that forming a trade union is not subject to excessive formalities.[25]

As in Slovenia we identify a number of problems with regard to the representativeness of trade unions, it is appropriate to draw attention to the Committee's interpretation of the Charter, according to which limitation of the right to call a strike to the representative or the most representative trade unions constitutes a restriction which is not in conformity with Article 6/4.[26]

I have already pointed out the deficiency of the current legislation, i.e., that it does not contain any provision on the *participants* in the strike, so the case-law of the ECSR applies. In this respect, the ECSR points out: "Once a strike has been called, any employee concerned, irrespective of whether he is a member of the trade union having called the strike or not, has the right to participate in a strike".[27]

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sibility for the lawfulness of strike lies on the person who announces and organizes the strike. In the Strike Act, the strike committee is defined only as the operational body of the organizer of the strike for the duration of the strike. Article 48 of the Labour and Social Courts Act (ZDSS-1) does not provide that the strike committee is allowed to participate in a dispute concerning the legality of a strike as a participant against which a request for a declaration of unlawfulness would be directed (Judgment and Order of VSRS VIII Ips 492/2007, 13 May 2008).

25 Conclusions 2004, Sweden, Conclusions 2014, Germany.
In Conclusions 2002 the Committee concluded that the situation in Sweden was not in conformity with Article 6/4 of the Charter because strikes could only be called by those entitled to be parties to collective agreements. In 2004 it decided to re-examine the situation. According to the partly completed interpretation, the Committee underlines that the reference to »workers« in Article 6/4 relates to those who are entitled to take part in collective action but says nothing about those empowered to call a strike. In other words, this provision does not require states to grant any group of workers authority to call a strike but leaves them the option of deciding which groups shall have this right and thus of restricting the right to call a strike to trade unions. However, such restrictions are only compatible with the Charter if there is complete freedom to form trade unions and the process is not subject to excessive formalities that would impede the rapid decision that strike action sometimes requires.

26 Conclusions XV-1 (2000), France.

27 Conclusions XVI-1 (2002), Portugal.

2.3. Procedural issues

Article 2 of the Strike Act lays down which body has the right to take a decision on the beginning of a strike called by a trade union, and who decides on the beginning when a strike is called directly by workers. It further lays down the content of the decision on the beginning of a strike (strike requirements, the timing of the strike, the place of gathering of the strikers, the formation of a strike committee, the announcement of the strike). In the light of the possible new regulation, a thorough reflection on the following issues should be considered:

Firstly, I would like to point to the – according to some[28] – discriminatory and, therefore, unconstitutional regulation of the Strike Act according to which a decision to call a strike (at various levels) may be taken by a competent trade union body. When a strike within the organization, part of organization or the employer is called by workers themselves, the vote in favor of the decision to initiate the strike must be taken by the majority of the employed workers.

Some issues relating to the organization and carrying out of a strike may be the subject of collective agreements, but regulations are often questionable and may also not be in conformity with the Constitution. For example, autonomous regulation is controversial when a collective agreement requires that the announcement of a strike must also include the *envisaged duration* of the strike. Such a requirement may be indirectly achievable in the case of a declaration of a several-hour or one-day strike, but certainly not in the case of longer strikes, where the cessation of the strike depends on the conclusion of an agreement on strike demands. Attention should be paid to the warnings that such a requirement is not in compliance with Article 76 of the Constitution of the Republic of Slovenia (trade union freedom) because it restricts the right of the organizers of the strike to so-called freedom of trade union activity.

Another example of a questionable practice in relation to the carrying out of a strike pertains to the increasing cases of unilateral *freezing* of a strike when strikers take a decision to suspend the strike (the duration of the suspension is not always defined) with the intention to continue it if the opposing party in the dispute does not comply with the strike requirements. The Supreme Court of the Republic of Slovenia has ruled that a strike cannot be unilaterally interrupted, without a mutual agreement. A strike can only be terminated unilaterally, not interrupted. In case of continuation (a strike organized anew) the

[28] See i.e.: Debelak, M., *op. cit.* (fn. 21), pp. 358.

strike organizer must take all adequate decisions related to the continuation of the strike and in due time announce the continuation.[29]

So far, the ECSR has only focused on issues relating to the strike vote. It concluded that "subjecting the exercise of the right to strike to prior approval by a certain percentage of workers is in conformity with Article 6/4, provided that the ballot method, the quorum and the majority required are not such that the exercise of the right to strike is excessively limited".[30]

2.4. Principles of necessity, adequacy and proportionality of the strike

The legislation in force does not provide that a lawful strike must comply with the principles of necessity, adequacy and proportionality. However, we are faced with efforts to conceptually limit the exercise of the right to strike (in law and practice) with these principles, along the lines of some other countries (e.g., Germany). In the past, even the Supreme Court of the Republic of Slovenia has already taken the view that a strike must be necessary, appropriate and proportionate, because it is against the employer's right to property and free economic initiative.[31] However, the Higher Labour and Social Court has – in my opinion – taken the right position, holding that the legislation in force does not allow the court to assess the lawfulness of the strike in the light of its necessity, appropriateness or proportionality (as a proportion between the benefit which the striking workers wish to achieve and the damage caused to the employer by the strike), nor can it decide whether the strike requirements are (un)founded.[32] The Court ruled that the principles mentioned are also unacceptable in terms of constitutional regulation. The '*urgency of a strike*' means that a strike is the last resort to achieve a particular objective. It is an *ultima ratio* doctrine, which does not comply with Article 77 of the Constitution of the Republic of Slovenia. While the Constitution allows for a limitation of the constitutional right to strike by requiring a public benefit, it does not impose an additional requirement to assess whether a strike is urgent. Nor does the Constitution of the Republic of Slovenia provide for a limitation of constitutional rights by *testing the adequacy* of exercising constitutional rights.

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29 Ruling of the Supreme Court of the Republic of Slovenia VIII lps 48/2003, 20 June 2005.

30 Conclusions II (1971), Cyprus; Conclusions XIV-1 (1998), United Kingdom.

31 Ruling of the Supreme Court of the Republic of Slovenia VIII lps 222/2005, 21 January 2006.

32 Rulings of the Higher Labour and Social Court of the Republic of Slovenia: ruling X Pdp 551/2012, 27 September 2012, and ruling X Pdp 136/20013, 21 July 2013.

The same applies to the principle of *proportionality*.[33] As regards the principle of proportionality, there are at least two reasons for opposing the proportionality doctrine. First, there is a risk that the assessment of the existence of proportionality could turn into the assessment of the (un)suitability of a strike, for which we have already established that it cannot be subject to judicial review since there is no basis for that in the legislation in force. Secondly, the strike is among others characterized by the fact that it causes damage to the employer and possibly to third parties, too. The success of a strike, and, for example, the extent of the damage it caused cannot always be assessed during or immediately after the strike ends. Therefore, the legality of a strike cannot be assessed by the court of law in the light of the damage suffered.[34]

Here we can address again the Charter and underline that the European Committee on Social Rights always insists on compliance with Appendix to Article 6/4 which stipulates:

"It is understood that each Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under terms of Article G".[35]

The Committee considers that the right to strike may be restricted provided that any restriction satisfies the conditions laid down in Article G, which provides that restrictions on the rights guaranteed by the Charter that are prescribed by law[36], serve a legitimate purpose and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals.[37]

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33 In practice, the principle of proportionality in the sense that a strike does not cause the employer any incomprehensible or disproportionate damage and that the adverse consequences of the strike are proportionate to the benefits.

34 For more on that see: Debelak, M., *Pravna ureditev stavke de lege ferenda (Legal Regulation of the Right to Strike de lege ferenda*, Delavci in delodajalci, no. 1, 2010, pp. 36-39; *idem*, *op. cit.* (fn. 21), pp. 362-363.

35 Article G of the Revised Social Charter corresponds to Article 31 of the 1961 Charter.

36 The ECSR considered that the expression "prescribed by law" Article G does not require that restrictions must necessarily be imposed solely through provisions of statutory law. The case-law of domestic courts may also comply with this requirement provided that it is sufficiently stable and foreseeable to provide sufficient legal certainty for the parties concerned. In addition, the Committee considered that the expression »prescribed by law« includes within its scope the requirement that fair procedures are in place. European Trade Union Confederation, Centrale Générale des Syndicats Libéraux de Belgique, Conféderation Chrétiens de Belgique, Fédération Génerale du Travail de Belgique v. Belgium, Complaint No. 59/2009, Decision on the merits of 13 Septembre 2011.

37 E.g., Conclusions X-1 Norway (regarding Article 31 of the Charter).

2.5. Limitations[38] of the right to strike for workers in state bodies and public services

The regulation of the limitation of the right to strike in Slovenia is problematic in many respects.[39] On the one hand, terminology is out of date since it is based on the former structure of the public sector and, on the other, there are reasonable doubts as to whether the regulation of the restrictions to strikes in the Strike Act is in line with the Constitution of the Republic of Slovenia, and whether the relevant statutory and autonomous sectoral law are in line with the Strike Act, the Constitution of the Republic of Slovenia and international norms. We must not forget the provision of the Constitution of the Republic of Slovenia (Article 77/2) stating that the right to strike may be restricted by law where required by public interest with due consideration given to the type and nature of activity. The Constitution thus allows restrictions to strikes if a public benefit so requires, however by taking into account cumulatively the type and the nature of the activity. The treatment of workers in state bodies and in public services within the meaning of uniform categories is not in line with the Constitution. Within one or another category there are groups of workers who perform different jobs or, e.g., in the case of employees of state bodies, have different functions. There are obvious differences within the two categories of workers which make it impermissible to restrict the right to strike for all workers, without differentiation, in a particular activity, irrespective of whether the public interest in fact necessitates a restriction.

As regards the restrictions on the exercise of the right to strike, the issue of the provision of *minimum services* (in public services) or the definition of the works to be carried out by employees of public authorities during the strike is particularly topical. In both cases, the Strike Act leaves more detailed regulation to relatively numerous sectoral laws[40] and collective agreements. As regards strikes by workers in public bodies, the regulation in the Strike Act is controversial because, while it does not expressly prohibit strikes by a formal

[38] The use of the term might not be precise enough as it is used in two senses: either as the procedural requirements regarding the exercise of the right or as a suppression of the right. In connection with Article 6/4 of the ESC the term "restrictions" is being used by the ECSR.

[39] The "problem" is mainly highlighted by scholars, whereas the courts have not yet adopted clear positions on a number of controversial solutions in the legal system.

[40] E.g., Public services: Health Services Act, Aviation Act, Telecommunication Act, Road Transport Act, Postal Services Act, Railway Transport Act, Fire Services Act, Postal Services Act; State Bodies: Defence Act, Police Act, Customs Service Act, Enforcement of Penal Sanctions Act, Courts Act, Judicial Service Act, State Prosecution Act.

act, the determination of the works which workers must carry out also during the strike, means that they actually cannot go on strike. Their right to strike is not only limited – they are effectively deprived of it. For workers in public services, the Strike Act requires that a (special) act shall prescribe a manner of providing the conditions for exercising the right to strike, and that a collective agreement shall determine the work and tasks performed by the workers during the strike. Thereby, they must comply with two conditions: 1. ensuring a minimum of work process that ensures the safety of people and property or that it is an irreplaceable condition for the life and work of citizens or work of other organizations, and 2. fulfilling international obligations.[41]

With regard to the ESL, one can summarize the following ECSR guidelines regarding the limitation of the right to strike:

As regards restrictions related to essential services/sectors the Committee considers that "prohibiting strikes in sectors which are essential to the community is deemed to serve a legitimate purpose since strikes in these sectors could pose a threat to public interest, national security and/or public health.[42] However, simply banning strikes even in essential sectors – particularly when they are extensively defined, i.e. "energy" or "health" – is not deemed proportionate to the specific requirement of each sector. At most, the introduction of a minimum service requirement in these sectors might be considered in conformity with Article 6/4".[43]

"Public officials enjoy the right to strike under Article 6/4. Therefore, prohibiting all public officials from exercising the right to strike is not in conformity with Article 6/4. They must be entitled to withdraw their labour.[44] The right to strike of certain categories of public officials, such as members of the armed forces, may be restricted. Under Article G, these restrictions should be limited to public officials whose duties and functions, given their nature or level of responsibility are directly related to national security, general interest etc."[45]

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41 The condition is in contradiction to the constitutional regime, under which the right to strike may be limited where a public benefit so requires.

42 Conclusions I (1969) Statement of Interpretation on Article 6/4; Confederation of Independent Trade Unions in Bulgaria, Confederation of Labour »Podkrepka) and European Trade Union Confederation v. Bulgaria, Complaint No. 32/2005, 16.10.2006.

43 Conclusions XVII-1 (2004) Czech Republic.

44 Conclusions I (1969), Statement of Interpretation on Article 6/4.

45 *Ibid*.; Confederation of Independent Trade Union in Bulgaria, Confederation of Labour "Podkrepka" and European Trade Union Confederation v. Bulgaria, Complaint No. 32/2005, 16.10.2006; EUROMIL v. Ireland Complaint No. 112/2014 12.9.2017.

"Concerning police officers, an absolute prohibition on the right to strike can be considered in conformity with Article 6/4 only if there are compelling reasons justifying it. On the other hand, the imposition of restrictions as to the mode and form of such strike action can be in conformity with the Charter.[46]"

Case-law of the ECSR contains certain interpretations of basic significance in addressing shortcomings in Slovenian legal system. However, they can only be taken into account if they are also consistent with the constitutional concept of the right to strike.

3. CONCLUSION

The paper is intended to indicate legal problems relating to the exercise of the constitutional right of workers to strike in Slovenia. The point of departure is that the new strike legislation is indispensable. The brief discussion covers selected issues which are from the conceptual point of view, and from the point of view of the practice of exercising of the right to strike, relevant to the possible new legal regulation of strike. The shortcomings in the current regulation and practice are linked to the implementation of the outdated Strike Act and to the statutory and autonomous arrangements, which are not in conformity with the Strike Act, the Constitution and binding international norms. The discussion is limited to the European Social Charter and its provisions on the right to strike. The case-law and the interpretations of these provisions given by the European Committee of Social Rights should be taken into consideration when drafting a new strike act. They are very important from the conceptual point of view, especially as they lead to restrictive limitations of the right to strike.

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[46] European Confederation of Police v. Ireland, Complaint No. 83/2012, 2.12.2013.

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Sažetak

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OSTVARIVANJE PRAVA NA ŠTRAJK U SLOVENIJI: O NEKIM KONTROVERZNIM PITANJIMA I SUKLADNOSTI S EUROPSKOM SOCIJALNOM POVELJOM

U radu se polazi od ideje da u Sloveniji primjena Zakona o štrajku, koji je donesen još u bivšoj Jugoslaviji, zahtijeva duboke promjene, s obzirom na to da nije usklađena s ustavnom koncepcijom prava na štrajk kao ni s pristupom koji proizlazi iz međunarodnih pravnih izvora i/ili tumačenja tih izvora od strane nadležnih nadzornih tijela. Isključivi naglasak pritom je stavljen na Europsku socijalnu povelju, primjenu koje nadzire Europski odbor za socijalna prava. Autorica se ukratko osvrće na pojedina (neprimjerena) rješenja u domaćem pravnom sustavu te na njihovu provedbu. Nadalje se skreće pozornost na moguće promjene de lege ferenda u skladu s tumačenjima odredaba Europske socijalne povelje koje proizlaze iz prakse Europskog odbora za socijalna prava. Posebice se upozorava na neodgovarajuću zakonsku regulativu kojom su utvrđena ograničenja prava na štrajk u državnim tijelima i javnim službama.

Ključne riječi: Zakon o štrajku, Europska socijalna povelja, načela nužnosti, primjerenosti i razmjernosti, ograničenja

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