Case number:
U-I-289/13

ECLI:
ECLI:SI:USRS:2016:U.I.289.13

Challenged act:
Defence Act (Official Gazette RS, Nos. 103/04 – official consolidated text and 95/15) (DA), 1st para. of Art. 99.

Operative provisions:
The first paragraph of Article 99 of the Defence Act (Official Gazette RS, Nos. 103/04 – official consolidated text and 95/15) is not inconsistent with the Constitution.

Abstract:
Military service comprises a specific set of tasks that due to the constitutionally determined duty to defend the state enshrined in the first paragraph of Article 123 of the Constitution (in conjunction with Article 124 of the Constitution) have to be performed continuously. Due to this constitutional duty, during the performance of military service military personnel do not have a constitutionally guaranteed right to strike on the basis of Article 77 of the Constitution, which entails that neither the first nor the second paragraph of Article 77 of the Constitution apply thereto. Therefore, the challenged provision, which during the performance of military service prohibits military personnel from striking, does not entail an interference with the right to strike determined by Article 77 of the Constitution.

Considering the particular characteristics of military service as a manner of exercising the duty to defend the state determined by Article 123 of the Constitution, military personnel performing military service, members of the police, and other civil servants in the field of defence are not in comparable positions with regard to the right to strike, as their positions differ from the perspective of constitutional law. Therefore, the legislature can regulate their positions differently.

Thesaurus:
1.5.51.1.13.1 - Constitutional Justice - Decisions - Types of decisions of the Constitutional Court - In abstract review proceedings - Finding that a regulation is in conformity - With the Constitution.
1.2.51.3.6 - Constitutional Justice - Types of claim - Capacity to file a petition with the Constitutional Court - Filer of a request - Representative trade union for the territory of the State.
5.4.10 - Fundamental Rights - Economic, social and cultural rights - Right to strike.
5.2 - Fundamental Rights - Equality.
5.1.4 - Fundamental Rights - General questions - Emergency situations.
1.5.5.2 - Constitutional Justice - Decisions - Individual opinions of members - Dissenting opinions.

Legal basis:
Arts. 21, 77, 123, 124, Constitution [CRS]

Art. 21, Constitutional Court Act [CCA]

Cases joined:
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PDF Format:
U-I-289-13.pdf
U-I-289-13 - Dissenting Opinion - Dr Korpič – Horvat.pdf
U-I-289-13 - Summary.pdf

Full text:
U-I-289/13
10 March 2016

DECISION

At a session held on 10 March 2016 in proceedings to review constitutionality initiated upon the request of the Trade Union of Slovene Soldiers, represented by Klemen Vogrinec, attorney in Slovenska Bistrica, the Constitutional Court

decided as follows:

The first paragraph of Article 99 of the Defence Act (Official Gazette RS, Nos. 103/04 – official consolidated text and 95/15) is not inconsistent with the Constitution.

REASONING

A

1. The applicant challenges the first paragraph of Article 99 of the Defence Act (hereinafter referred to as the DA), which determines that military personnel do not have the right to strike during the performance of military service. It alleges that this provision is inconsistent with Articles 14, 16, 76, 77, 92, and 124 of the Constitution. It states that the challenged provision determines a complete prohibition on strikes as regards all military personnel in peacetime, i.e. when there is no state of emergency or war, for which there is no legal basis in Article 124 of the Constitution. The prohibition on striking is allegedly also inconsistent with Article 77 of the Constitution, which determines that where required by the public interest, the right to strike may merely be restricted by law. The applicant opines that the fourth paragraph of Article 99 of the DA sufficiently restricts the right to strike on the basis of this constitutional provision. Allegedly, the prohibition on striking entails a violation of the principle of equality before the law in comparison with the regulation of strikes by police employees, whose right to strike is only restricted, but not prohibited. The applicant opines that the challenged regulation is

also inconsistent with Article 92 in conjunction with Article 16 of the Constitution, as it is inadmissible to restrict rights stemming from the Constitution, except during a state of emergency or war. The applicant also alleges an inconsistency with Article 76 of the Constitution, as the challenged provision limits the freedom to operate trade unions, which cannot effectively fight for the rights of its members by means of a strike.

2. The Constitutional Court sent the request to the National Assembly, which in its reply primarily states that the challenged provision does not directly threaten or violate the rights of employees, i.e. military personnel. It opines that the applicant is merely defending its rights and legal position as the representative trade union, which due to the statutory prohibition cannot organise strikes. Subordinately, it draws attention to the specific nature and position of the organisation of the armed forces, which allegedly justify certain specific powers and prohibitions concerning military personnel, including the prohibition on striking. The National Assembly alleges that the challenged provision is clear and that the applicant merely alleges its inconsistency with a number of articles of the Constitution, without substantiating it. As regards the alleged inconsistency with Articles 16 and 92 of the Constitution, the National Assembly claims that the challenged provision prohibits military personnel from striking during the performance of military service in all instances, therefore the alleged inconsistency with an emphasis on war or a state of emergency is irrelevant. Similarly, there is allegedly no particular connection between Article 124 of the Constitution, which refers to national defence in general, and the challenged provision. With respect to the [alleged] violation of the principle of equality, the National Assembly opines that the differentiation between military personnel and other employees who have the right to strike in full or to a limited extent (e.g. police officers and certain employees of state authorities) is constitutionally consistent, as it is based on reasonable grounds. In this respect, it refers to Decisions of the Constitutional Court No. U-I-278/07, dated 22 October 2009 (Official Gazette RS, No. 94/09, and OdlUS XVIII, 47), and No. U-I-101/95, dated 8 January 1998 (Official Gazette RS, No. 13/98, and OdlUS VII, 2), and to Order No. U-I-329/04, dated 12 May 2005 (Official Gazette RS, No. 53/05, and OdlUS XIV, 27). Due to the specific position of military personnel and the fact that the prohibition on striking only applies to military personnel during the performance of military service, the challenged provision is allegedly in conformity with Article 77 of the Constitution.

3. The Government also submitted an opinion, in which it states that the fundamental characteristic of military tasks referred to in Article 37 of the DA is that the substance and importance of these tasks are such that the majority thereof must be performed continuously and in an unhindered manner, regardless of whether they concern classic military tasks or the cooperation of the armed forces in protection or rescue operations, or in providing assistance during natural and other disasters. In addition to these tasks, within the framework of fulfilling international obligations abroad that the Republic of Slovenia has assumed, the Slovene Armed Forces must perform tasks in international operations and missions in crisis areas, and operate in common commands, units, and representations of the alliance [i.e. NATO] or other international organisations. The

Slovene Armed Forces are also fully involved in the system of collective defence, within the framework of which different forms of supervision and protection are continuously carried out in the territory of the member states of [NATO]. The Government stresses that every military organisation is specific due to its nature, as work therein gives specific powers and responsibilities to the members thereof. This holds true in particular for military personnel, who perform military service and also have a statutory right to bear and use arms, due to which the performance of military service also entails an increased threat to the security and rights of the individuals concerned and other persons. A specificity of military organisation allegedly also lies in the fact that it is distinctly hierarchically organised and is based on observance of fundamental principles regarding the unity of command and subordination. Also the principle of the obligatory execution of orders falls within this context. In the opinion of the Government, it is not always possible to strictly separate the statutory objective and subjective criteria as regards restrictions on striking determined by the legislature in some types of activities. By the nature of the matter, performing military service is inseparably connected with performing all the tasks that, due to the public interest, must also be performed during a strike. The Government explains that in the vast majority of European states, members of the armed forces do not have the right to strike, whereas a small number of states in fact formally recognise the members of the armed forces such right, but only in exceptional cases and under strict conditions. In the opinion of the Government, one also cannot substantiate that the challenged regulation is inconsistent with Article 14 of the Constitution, as the Constitutional Court has already adopted the position that the legislature has the possibility, due to the particularities of and differences in the work, organisation, and other requirements regarding professional work in the military to regulate individual questions pertaining to labour law differently than they are regulated in other fields of employment (see Decision No. U-I-101/95 and Order No. U-I-329/04). In the assessment of the Government, taking into account the nature of military tasks and of military service, the legislature had reasonable grounds for the differentiation at issue, similarly as with regard to some other questions pertaining to labour law.

4. The Constitutional Court sent the reply of the National Assembly and the opinion of the Government to the applicant. The applicant alleges that it concurs with the fact that in times of heightened alert or war there must not be a strike, as [otherwise] the consequences would affect the public interest. However, it does not concur that striking should be prohibited in peacetime, when it allegedly has no consequences for the public interest. In the opinion of the applicant, the second paragraph of Article 77 of the Constitution does not allow the right to strike to be subjectively restricted in the sense that it is completely prohibited for a certain category of employees (employees occupying certain employment positions), as the Constitution only allows striking to be restricted where required by the public interest. Due to the prohibition on military personnel striking, they are allegedly treated unequally compared to other employees in the field of defence and the members of the police, who have to be operative in peacetime and perform all tasks in the public interest, and are able to strike when no war

or state of emergency has been declared, provided that they observe the statutory limitations. The applicant stresses that in the Service in the Slovene Armed Forces Act (Official Gazette RS, No. 68/07 – hereinafter referred to as the SSAFA), continuous preparedness and heightened alert are equal to a state of emergency [or] war [*sic*] (point 9 of Article 3 of the SSAFA), in which, in accordance with the fourth paragraph of Article 99 of the DA, military personnel and employees performing administrative and expert tasks in the defence field – i.e. all employees in the defence field – do not have the right to strike. Such allegedly entails that the SSAFA restricts striking completely as regards all the tasks that the Slovene Armed Forces have to continuously perform also in peacetime, therefore there is no need to completely prohibit military personnel from striking and to treat them unequally compared to employees who carry out administrative and expert tasks in the field of defence. The applicant opines that the prohibition on striking determined by the first paragraph of Article 99 of the DA does not entail a constitutional matter that would determine a matter that falls within the field of defence as determined by Article 124 of the Constitution. It alleges that the main and fundamental task of military personnel is to defend the territorial integrity of the Republic of Slovenia, which entails that in peacetime military personnel can operatively perform urgent tasks and exercise the right to collective association, i.e. to strike. It also alleges that, in the past, the state paid military personnel an allowance for the prohibition on striking due to the manifest deprivation of their constitutional right to strike, which, however, was discontinued in 2008, when the new payment system was introduced.

B – I

5. The applicant's main allegation is that the challenged regulation inadmissibly interferes with the right to strike determined by Article 77 of the Constitution, as it in fact denies military personnel such right during the performance of military service, while the Constitution only allows for a limitation thereof. The challenged provision prohibits strikes by military personnel during the performance of military service. From the viewpoint of the protection of their rights, which the applicant alleges are threatened, the right to strike could be protected within the framework of Article 77 of the Constitution and not by Article 76 of the Constitution, which, *inter alia*, ensures the freedom of trade unions to organise strikes.

6. The first paragraph of Article 77 of the Constitution determines that workers have the right to strike. In accordance with the second paragraph of Article 77 of the Constitution, this right may be restricted by law where required by the public interest and with due consideration of the type and nature of activity involved.

B – II

7. International instruments also regulate the right to strike. The International Covenant

on Economic, Social and Cultural Rights (Official Gazette SFRY, No. 7/71, and Official Gazette RS, No. 35/92, MP, No. 9/92) includes in Article 8 the right of trade unions to function freely, which also expressly includes the right to strike. It determines that by the laws of a certain state it is possible to restrict such right on the basis of both objective and subjective criteria. The right to association is also regulated in the same manner by the International Covenant on Civil and Political Rights (Official Gazette SFRY, No. 7/91, and Official Gazette RS, No. 35/92, MP, No. 9/92), which in Article 22 allows this right of members of the armed forces and the police to be restricted according to both objective and subjective criteria. However, it does not include the right to strike. Furthermore, in accordance with the European Social Charter (Revised) (Official Gazette RS, No. 24/99, MP, No. 7/99 – hereinafter referred to as the ESC), contracting parties may regulate by law the exercise of the right to strike, with regard to which any restrictions are only justified if they are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of the public interest, national security, public health, or morals (Article G). Also the ESC allows the different treatment of members of the police compared to members of the armed forces (Article 5). In accordance with the interpretation of the European Committee of Social Rights, the ESC only allows the complete prohibition of organising strikes by the members of the armed forces, but not also by the members of the police.[1] The right to strike is also guaranteed by the Charter of Fundamental Rights of the European Union (OJ C 326, 26 October 2012 – hereinafter referred to as the Charter), whose Article 28 determines that workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

8. The International Labour Organisation adopted two conventions relating to the right to association and the right to strike. Convention No. 87 of the International Labour Organisation concerning Freedom of Association and Protection of the Right to Organise (Official Gazette FPRY, No. 8/58, and the Act on the Notification of Succession, Official Gazette RS, No. 54/92, MP, No. 15/92) guarantees the right to establish organisations and to join them. Article 9 envisages the possibility that members of the armed forces and the police are treated differently. It leaves the determination of guarantees therefor to national regulations. In fact, the right to strike is not expressly mentioned, however supervisory authorities have adopted a number of positions with regard to striking, *inter alia,* that the right to strike is one of the essential and legitimate means by which workers and their organisations can assert and defend their social and economic interests.[2] Also Convention No. 98 of the International Labour Organisation concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (Official Gazette FPRY, No. 11/58, and the Act on the Notification of Succession, Official Gazette RS, No. 54/92, MP, No. 15/92), whose objective is to ensure the protection of workers from discrimination in respect of their employment in order to exercise the freedom of trade unions and to promote the development and use of procedures of voluntary negotiations

between employers or employers' organisations and workers' organisations, declares, in Article 5, that national legislation is free to determine the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police.[3]

9. From the mentioned international regulation, it follows that also international instruments allow for restrictions on the right to strike, namely according to both objective and subjective criteria, and allow members of the armed forces to be excluded from enjoyment of this right.

B – III

10. The first paragraph of Article 99 of the DA prohibits strikes by military personnel during the performance of military service. The regulation of military service is based on Article 123 of the Constitution, which regulates the duty to participate in the national defence, and on Article 124 of the Constitution, of which the first and second paragraphs authorise the National Assembly to regulate by law the form, extent, and organisation of the defence of the inviolability and integrity of the national territory. This can only be successfully ensured if such defence is organised and prepared already in peacetime, in particular by performing military service. In accordance with the first paragraph of Article 123 of the Constitution, participation in the national defence is compulsory for citizens within the limits and in the manner provided by law. In accordance with the second paragraph of the mentioned provision of the Constitution, citizens who due to their religious, philosophical, or humanitarian convictions are not willing to perform military duties must be given the opportunity to participate in the national defence in some other manner. Article 123 of the Constitution refers to individuals – citizens of the Republic of Slovenia. On the one hand, this Article imposes on them the general obligation to participate in the national defence, but leaves the manner and the extent of its implementation to a law. On the other hand, this Article allows in and of itself the regulation of alternative participation in the national defence by those citizens who due to so-called conscientious objection are not willing to participate in performing that part of defence tasks that represent the performance of military obligations or the performance of military service.[4] Such entails that also those citizens whose conscientious objection is recognised have the constitutional obligation to participate in defending the state, however without using weapons.

11. Hence, citizens have a positive duty to actively defend the state.[5] This duty determined by the Constitution necessarily influences the rights – including the human rights – of every citizen. From the duty to participate in defending the state there can follow limitations of individuals' human rights.[6] In certain instances, this constitutionally determined duty may even lead to the exclusion of a specific group of individuals from the enjoyment of a human right.

12. On the basis of the first paragraph of Article 123 of the Constitution, the DA

determines the manner and extent of the performance of the duty to defend the state, and thus the duties and rights of citizens with regard to national defence. The first paragraph of Article 6 of the DA determines that with regard to national defence citizens have the following duties: military duty, work duty, and material duty. Military duty is exercised in the Slovene Armed Forces and in communication units. On the basis of the second paragraph of Article 123 of the Constitution, the second paragraph of Article 6 of the DA determines that a citizen granted conscientious objector status shall participate in the national defence by carrying out alternative civilian service in the civil protection or other protection, rescue, and relief services, or shall be trained to carry out protection and rescue operations and shall carry out such duties in wartime as well.

13. Military duty (which is one of three defence duties) is carried out by performing military service. Hence, military service entails a specific manner of carrying out the civic duty to participate in the national defence determined by Article 123 of the Constitution. It includes the performance of military and other tasks within military commands, units, and institutes, in other military formations and in certain employment positions in the ministry competent for defence, as well as in other state authorities (point 13 of Article 5 of the DA). Military service is performed by military personnel (point 14 of Article 5 of the DA). It entails the performance of a specific set of tasks ensuring the defensive capability of the state, the inviolability and integrity of the national territory, protection and rescue in the event of natural and other disasters, and the fulfilment of international commitments assumed by treaties in the field of defence.[7] The determination of strict and precise rules as regards the performance of military service indicates that this set of tasks has a specific nature. These rules determine, *inter alia*, that members [of the armed forces] performing military service must strictly observe the principles regarding the unity of command and subordination, and the rules of service (Article 8 of the SSAFA). Members [of the armed forces] shall perform military service unconditionally, with precision, correctly, and promptly, in accordance with the regulations, rules of service, and acts regulating leadership and command. Subordinates shall not discuss the decisions of superiors, unless they are called on to do so or if such is in conformity with the rules of service (Article 9 of the SSAFA). Military personnel must execute orders that are commands without objection. While military personnel can in fact file an official objection against an order, they must execute the order without undue delay (the first, second, and third paragraphs of Article 32 of the SSAFA). When performing military service, members of the armed forces must act with honour and in conformity with the code of military ethics of the Slovene Armed Forces and rules of service (Article 6 of the SSAFA). The fact that performing military service entails a specific set of tasks is also evident from the first paragraph of Article 76 of the SSAFA, which, due to the particular burdens, responsibilities, and requirements in performing military service[8], confers on military personnel the right to comprehensive care, which includes health care, psychological care, social care, legal assistance, legal counselling, religious and spiritual care, sport activities, and organised leisure activities.

14. Military service, which is performed exclusively by military personnel, thus entails the

performance of a specific set of tasks that are of crucial importance for ensuring readiness to fulfil the statutory tasks of the armed forces in peacetime and war and constitute a manner of exercising the duty to defend the state determined by the first paragraph of Article 123 of the Constitution. It is irrelevant whether in accordance with the statutory regulation in force such duty is assumed voluntarily or whether the relationship between individuals and the state is regulated by an employment contract or not. Both professional performance of military service in the permanent formation of the Slovene Armed Forces and the calling up of members of the contractual reserves entail specific forms of the exercise of the duty to defend the state determined by the Constitution. Under the conditions determined by the DA and the Military Service Act (Official Gazette RS, No. 108/02 – official consolidated text), such also applies to all members of the reserves. The national defence is primarily intended to ensure the inviolability and integrity of the national territory (the first paragraph of Article 124 of the Constitution). The defence of the inviolability and integrity of the national territory, as well as the fulfilment of international obligations in the field of defence, can (only) be ensured through continuous and unhindered performance of military service tasks. Such conceptually excludes interruptions in the performance of military service that depend on the free will [of military personnel] and entail suspension of the performance of the military duty of persons who as soldiers are the first to be called upon to perform such.

15. Hence, military service comprises a specific set of tasks that have to be performed continuously due to the constitutionally determined duty to defend the state enshrined in the first paragraph of Article 123 of the Constitution (in conjunction with Article 124 of the Constitution). Therefore, as regards military personnel performing military service, this constitutional duty of military personnel excludes their right to strike determined by Article 77 of the Constitution. Military personnel are thus beyond the ambit of this human right, entailing that neither the first nor the second paragraphs of Article 77 of the Constitution apply thereto. With regard to the above, the challenged provision does not entail an interference with this human right and is not inconsistent therewith.

B – IV

16. The applicant also alleges that the challenged provision is inconsistent with the principle of equality before the law determined by the second paragraph of Article 14 of the Constitution. It alleges that due to the prohibition on striking, military personnel performing military service are placed in an unequal position in comparison with other civil servants (in the field of defence) and employees of the police, who are only subject to a restriction of the right to strike by means of an enumeration of the tasks that have to be carried out during a strike for public interest purposes.

17. The principle of equality before the law requires that the legislature regulate essentially equal positions of legal entities equally, and different positions accordingly differently. If the legislature regulates essentially equal positions differently or essentially

different positions equally, there must exist reasonable grounds therefor that follow from the nature of the matter.[9]

18. In light of what is stated above in Paragraphs 14 and 15 of this reasoning, military personnel performing military service, members of the police, and other civil servants in the field of defence are not in comparable positions with regard to the right to strike, as their positions differ from the perspective of constitutional law. Therefore, the legislature can regulate their positions differently. As regards the comparison with police officers, the Constitutional Court also notes that the statutory restrictions of the right to strike determined by Article 76 of the Police Organisation and Work Act (Official Gazette RS, Nos. 15/13, 11/14, and 86/15 – hereinafter referred to as the POWA) are determined in such a manner that during a strike police officers must carry out all tasks necessary to ensure the protection of the lives and personal safety of people and property. Namely, the first paragraph of Article 76 of the POWA determines that also during a strike police officers must carry out the following police tasks:
– protecting the lives and personal safety of people and property,
– preventing, detecting, and investigating criminal offences,
– discovering and arresting the perpetrators of criminal offences and other missing persons, and handing them over to the competent authorities,
– protecting certain persons, authorities, buildings, premises, and neighbourhoods of state authorities,
– maintaining public order,
– supervising and regulating traffic on public roads,
– performing supervision of the state border, and
– performing tasks determined by regulations on aliens.
Hence, when issues of security are at stake in all the fields falling within the competences of the police, also police officers are prohibited from striking. Considering the above-stated, the first paragraph of Article 99 of the DA is not inconsistent with the principle of equality determined by the second paragraph of Article 14 of the Constitution.

19. The applicant also alleges an inconsistency of the challenged provision with Article 92 in conjunction with Article 16 of the Constitution, as it is allegedly inadmissible to restrict rights stemming from the Constitution except during a state of emergency or war. Article 16 of the Constitution regulates the temporary suspension or restriction of rights during a war or state of emergency.[10] Article 92, on the other hand, regulates the declaration of war or a state of emergency, urgent measures, and the repeal thereof.[11] Both constitutional provisions determine a special regulation in times of war or a state of emergency which deviates from the regulation of human rights or fundamental freedoms that apply during peacetime. However, also in peacetime it is admissible to restrict human rights or fundamental freedoms under the conditions determined by the Constitution (the third paragraph of Article 15 of the Constitution). With regard to the above-stated, the allegation of the applicant that no human right may be restricted except during a state of emergency or war is not correct. Therefore, the first paragraph

of Article 99 of the DA, which prohibits military personnel from striking during peacetime, is not inconsistent with Article 92 in conjunction with Article 16 of the Constitution.

20. Considering the above-stated, the Constitutional Court decided that the first paragraph of Article 99 of the DA is not inconsistent with the Constitution.

C

21. The Constitutional Court adopted this Decision on the basis of Article 21 of the CCA, composed of: Mag. Miroslav Mozetič, President, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Pensa, Mag. Marta Klampfer, Dr Etelka Korpič – Horvat, Dr Ernest Petrič, Jasna Pogačar, Dr Jadranka Sovdat, and Jan Zobec. The Decision was adopted by six votes against three. Judges Korpič – Horvat, Sovdat, and Mozetič voted against. Judge Korpič – Horvat submitted a dissenting opinion.

Mag. Miroslav Mozetič
President

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[1] See M. Debelak, *Stavka* [Strike], master's thesis, Faculty of Law of the University of Ljubljana and GV Založba, Ljubljana 2006, p. 55.
[2] See P. Končar in: M. Novak, P. Končar, and A. Bubnov Škoberne (Eds.), *Konvencije Mednarodne organizacije dela s komentarjem* [Conventions of the International Labour Organization with Commentary], Inštitut za delo pri Pravni fakulteti Univerze v Ljubljani and GV Založba, Ljubljana 2006, p. 55.
[3] See *ibidem*, p. 59.
[4] J. Čebulj in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, pp. 895 and 896.
[5] J. Letnar Černič in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije, Dopolnitev – A* [Commentary on the Constitution of the Republic of Slovenia, Supplement – A], Fakulteta za državne in evropske študije, Ljubljana 2011, p. 1281.
[6] J. Čebulj, *op. cit.*, p. 896.
[7] *Cf.* Article 37 of the DA.
[8] During the performance of [military] service, military personnel also carry weapons in accordance with the rules of service (the first paragraph of Article 50 of the DA).
[9] *Cf.* Decisions of the Constitutional Court No. U-I-18/11, dated 19 January 2012 (Official Gazette RS, No. 9/12), and No. U-I-149/11, dated 7 June 2012 (Official Gazette RS, No. 51/12).
[10] Article 16 of the Constitution determines as follows:
"Human rights and fundamental freedoms provided by this Constitution may

exceptionally be temporarily suspended or restricted during a war and state of emergency. Human rights and fundamental freedoms may be suspended or restricted only for the duration of the war or state of emergency, but only to the extent required by such circumstances and inasmuch as the measures adopted do not create inequality based solely on race, national origin, sex, language, religion, political, or other conviction, material standing, birth, education, social status, or any other personal circumstance.
The provision of the preceding paragraph does not allow any temporary suspension or restriction of the rights provided by Articles 17, 18, 21, 27, 28, 29, and 41."
[11] Article 92 of the Constitution determines as follows:
"A state of emergency shall be declared whenever a great and general danger threatens the existence of the state. The declaration of war or state of emergency, urgent measures, and their repeal shall be decided upon by the National Assembly on the proposal of the Government.
The National Assembly decides on the use of the defence forces.
In the event that the National Assembly is unable to convene, the President of the Republic shall decide on matters from the first and second paragraphs of this article. Such decisions must be submitted for confirmation to the National Assembly immediately upon it next convening."

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U-I-289/13
14 March 2016

Dissenting Opinion of Judge Dr Korpič – Horvat

1. I do not concur with the majority decision of the Court that the constitutional duty to defend the state excludes the constitutional right of military personnel to strike.

2. The first paragraph of Article 99 of the Defence Act (Official Gazette RS, Nos. 103/04 – official consolidated text and 95/15 – hereinafter referred to as the DA) determines that during the performance of military service, military personnel are not allowed to strike. The majority of the judges adopted the decision that this is not inconsistent with the Constitution. Such decision is based on Article 123 of the Constitution, which determines the duty to participate in the national defence (hereinafter referred to as the defence duty), and not Article 77 of the Constitution, which determines the right to strike. I can summarise the reasoning of the majority decision in the following sentence: Military personnel perform the defence duty, and performing the defence duty in turn excludes the right to strike.

3. If I were the constitution-framer, I would perhaps concur with the proposal that military personnel should not be recognised the right to strike and would [accordingly] change the content of Article 77 of the Constitution. However, as a Constitutional Court judge I

will limit myself to assess what is and what is not in conformity with the Constitution. My view is that it is not in conformity with the Constitution to deny military personnel the right to strike and to exclude them from the ambit of Article 77 of the Constitution. The reasoning that military personnel do not have the right to strike because they perform the defence duty is unconvincing to me. I believe that in assessing whether military personnel have the constitutional right to strike an *a priori* position prevailed, namely that military personnel cannot strike, as the organisation of the military is strictly hierarchical, where orders are executed without objection, regardless of whether the defence is active or passive.[1]

4. Article 6 of the DA determines that citizens have three types of defence duties: military duty, work duty, and material duty. I stress that these are civic obligations. The titular holders of these duties are citizens. They are not duties that would apply expressly and merely to military personnel. I can omit work duty and material duty from my further consideration, as they have no relevance to the assessment of whether military personnel have the right to strike. Military duty is regulated by the Military Service Act (Official Gazette RS, No. 108/02 – official consolidated text – hereinafter referred to as the MSA). Citizens to whom military duty applies are military conscripts (Article 3 of the MSA). Military duty includes reporting for conscription duty, the duty of military conscripts to perform military service, and the duty to be a part of the reserves (Article 2 of the MSA). Hence, military conscripts include those who have reported for conscription duty, military conscripts performing military service, and reservists. Those who have reported for conscription duty are not military personnel, therefore the decision regarding the right to strike does not apply thereto. Military conscripts performing military service and reservists called up to perform such, however, are military personnel, namely in accordance with point 9 of Article 5 of the DA and point 2 of Article 3 of the Service in the Slovene Armed Forces Act (Official Gazette RS, No. 68/07). However, the performance of military service by military conscripts is not based on an employment contract, therefore military conscripts performing military service are not employees as referred to by Article 77 of the Constitution, and therefore it is manifest even without an in-depth assessment that military conscripts performing military service do not have the constitutional right to strike.[2] The same also applies *mutatis mutandis* as regards the right of reservists to strike.

5. In addition to the mentioned military personnel (i.e. military conscripts performing military service and reservists called up to perform military service), the DA also lists military personnel composed of professional members of the Slovene Armed Forces. These are soldiers, non-commissioned officers, commissioned officers, and military employees in the permanent formation of the Slovene Armed Forces. Without prejudice to the general [overview], I can limit my further consideration to soldiers, i.e. professional soldiers. Professional soldiers did not enlist in the armed forces upon a summons issued by the competent authority to present themselves on a certain date at a certain unit of the Slovene Armed Forces. Professional soldiers are public servants employed in the armed forces. They enlist in the Slovene Armed Forces because they decided to become

employed in the armed forces. Therefore, when assessing whether professional soldiers have the right to strike, Article 123 of the Constitution must be placed in opposition to Article 49 of the Constitution, whose second paragraph determines that everyone shall choose his employment freely. Those who join the armed forces as military conscripts who received a summons issued by the competent authority to present themselves on a certain date at a certain military unit are soldiers as a result of their military duty. Those who enlist in the armed forces because they have decided to be employed by the armed forces are soldiers as a result of their free choice of employment. Also those who decide to become employed by the armed forces out of necessity, because they do not have a better employment option, are soldiers as a result of their free choice of employment. Those who become soldiers as a result of their military duty are military conscripts and must perform their military service until it ends. Those who become soldiers as a result of their free choice of employment are public servants and perform their employment obligations voluntarily, in accordance with their employment contract.

6. In short, when assessing whether soldiers have the right to strike it is thus necessary to differentiate between soldiers who have become soldiers as a result of their military duty and professional soldiers who have become soldiers as a result of their free choice of employment. As I have already concluded, military conscripts serving military service and reservist soldiers do not have the right to strike because they are outside the ambit of the right to strike, as they do not have an employment contract, which is the necessary condition for [acquiring] the constitutional right to strike. I do not concur with the decision that even professional soldiers who have become soldiers as a result of their free choice of employment do not have the right to strike. Employment in the Slovene Armed Forces is indeed *sui generis* employment, yet it is employment based on an employment contract. Those who have concluded an employment contract with the Slovene Armed Forces are employees according to the terminology of Article 77 of the Constitution, which confers on employees the right to strike. This right thereof may be restricted by law, but one should not deny it. Yet, the majority of judges deny it, namely with the substantiation that professional soldiers carry out the defence duty, which according to them is so important that it excludes the constitutional right to strike.

7. Paragraph 14 of the reasoning – [where it is explained] why military personnel do not have the right to strike – contains the allegation that "[m]ilitary service, which is performed exclusively by military personnel […] constitutes a manner of exercising the duty to defend the state determined by the first paragraph of Article 123 of the Constitution." In addition to the members of the Slovene Armed Forces who perform their military service professionally, military service can also be performed (non-professionally) by military conscripts and reservists called up to perform military service. Professional soldiers are neither military conscripts performing military service nor reservists. It follows therefrom that the MSA does not impose military duty as a form of the defence duty on professional soldiers. The defence duty determined by Article 123 of the Constitution is a general civic duty. In accordance with the provision of the third indent of the first paragraph of Article 37 of the DA, the Slovene Armed Forces (the

permanent formation thereof) perform military defence in the event of an attack on the state. When the state is not attacked, professional soldiers do not perform their civic defence duty, but carry out their employment [obligations], which they freely chose (Article 49 of the Constitution), and there are no reasonable grounds to suspend their constitutional right to strike. The reason stated in Paragraph 14 of the reasoning as the grounds for suspending their right to strike (namely continuous and unhindered performance of tasks) does not constitute reasonable grounds, as the same grounds would enable the abolishment of the right to strike of many other employees who now have this right. Every profession has its own particularities that should be assessed from the viewpoint of the right to strike with respect to Article 77 of the Constitution.

8. The allegation that the performance of military service constitutes a manner of exercising the defence duty is followed by the statement in the reasoning that it is irrelevant whether the defence duty "is assumed voluntarily or whether the relationship between individuals and the state is regulated by an employment contract or not" (Paragraph 14 of the reasoning). Since professional soldiers perform military service professionally, I am surprised by the statement that it is irrelevant whether the relation thereof with the state is regulated by an employment contract or not. I believe that the Constitutional Court should have carried out the assessment of the conformity of the first paragraph of Article 99 of the DA with Article 77 of the Constitution precisely because professional soldiers perform military service on the basis of an employment contract. However, the Constitutional Court abrogated the right to strike in its entirety, without balancing whether the revocation of the right of professional soldiers to strike is justified in view of Article 77 [of the Constitution].

9. By excluding professional soldiers from Article 77 of the Constitution, the Constitutional Court assumed the role of the constitution-framers and attributed Article 77 a meaning that is not written in the Constitution. The duty of the Constitutional Court, however, is to preserve, by its assessment, the exercise of defence duties, on the one hand, and the right to strike, on the other, which in accordance with the second paragraph of Article 77 of the Constitution it could have limited, but not hollowed out, as it has done. This is an unusual case where the statutory concretisation of a constitutional duty derogates a constitutional right. The defence duty enshrined in Article 123 of the Constitution must be placed in opposition to the right to strike determined by Article 77 of the Constitution and then the extent of the admissible interference of the defence duty with the right to strike must be assessed. Since this entails an assessment of whether professional soldiers with the status of an employee have the right to strike, it would have been necessary to determine, by means of the test of proportionality, how significant an interference with the right to strike is justified by the defence duty determined by Article 123 of the Constitution. However, by excluding the right to strike, the majority [of the judges] avoided the test of proportionality, although the Constitutional Court has already decided by Decision No. U-I-321/02, dated 27 May 2004 (Official Gazette RS, No. 62/04, and OdlUS XIII, 42) that the admissibility of restrictions of the constitutional right to strike must also be assessed by means of the strict test of

proportionality.

10. Even if the majority proceeds from Article 123 of the Constitution, the Decision does not substantiate why the statutory reservation determined by Articles 123 and 124 of the Constitution cannot also incorporate a strike. “Participation in the national defence is compulsory for citizens within the limits and in the manner provided by law” (Article 123 of the Constitution), hence also in accordance with the law regulating strikes. The *lex specialis* regulating a strike is the DA, namely Article 99 thereof. The first paragraph of that Article determines as follows: “During the performance of military service, military personnel are not allowed to strike.” The fourth paragraph determines as follows: “In the event of an increased risk of attack on the state or in the event of an immediate threat of war, or if war or a state of emergency is declared, military personnel and employees performing administrative and specialist tasks in the defence field shall not have the right to strike for as long as the situation is not remedied. The prohibition on strikes shall also apply to other situations where the security and the defence of the state are at risk and where such nature of the situation is declared by the Government.” It is manifest at first sight that this provision is internally inconsistent. In my opinion, the majority should have explained why the fourth paragraph of Article 99 of the DA determines a limitation on striking if they believe that the first paragraph of the same Article absolutely prohibits military personnel from striking during the performance of military service. The question that is raised is why the legislature would regulate the prohibition on striking in times of heightened alert, war, and a state of emergency in the fourth paragraph of Article 99 of the DA if there is already an absolute prohibition on striking that applies to military personnel in peacetime. If this is so and if the legislature indeed wished to prohibit striking in peacetime, why did it not then clearly determine in the first paragraph of Article 99 of the DA that it is prohibited to strike in peacetime. Therefore, the interpretation in the Decision is not convincing where [the Decision] concludes, without argumentation, that the first paragraph of this Article refers to the prohibition on striking in peacetime, but overlooks the fourth paragraph in the comprehensive assessment of Article 99 of the DA. The least I can conclude therefrom is that Article 99 of the DA is unclear and imprecise, and hence inconsistent with Article 2 of the Constitution. It limits a constitutional right, whereas the Constitutional Court has already adopted the position that limitations of rights must be clear and precise.[3]

11. The assessment of the comparability of the positions of military personnel and of members of the police stated in Paragraph 18 of the majority decision failed to convince me that there is no violation of the principle of equality before the law determined by the second paragraph of Article 14 of the Constitution. The reasoning is internally inconsistent and does not contain a comparative analysis of the positions of services. It only establishes that performing military service and police service entail two distinct positions and that, therefore, the statutory regulation thereof can be different. Concurrently, it establishes that the DA and the Police Organisation and Work Act (Official Gazette RS, Nos. 15/13, 11/14, and 86/15) regulate the right to strike in an essentially equivalent manner. Hence, the reasoning is not logical. Furthermore, the comparison

only encompasses instances where members of the police must not strike, but does not include instances where they can.

12. I also believe that the majority decision denying military personnel the right to strike is contrary to international acts regulating the right to strike that are binding on the Republic of Slovenia. These are the international acts mentioned in Paragraphs 7 and 8 of the reasoning of the Decision. I would like to draw special attention to point (d) of the first paragraph and the second paragraph of Article 8 of the International Covenant on Economic, Social and Cultural Rights, which expressly recognise the right to strike provided that it is exercised in conformity with the laws of the particular country, and allow for the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the state. Hence, the mentioned Covenant does not allow that the right of professional soldiers to strike be excluded, equally as the Constitution of the Republic of Slovenia does not allow such, which in Article 77 recognises this right to all employees without exception. It only allows the right to strike to be restricted under certain conditions, but not hollowed out.[4]

13. A strike is the ultimate means for enforcing the economic and social rights of employees. Nonetheless, it is a democratic means whereby employees and the employer negotiate working conditions. The prohibition on strikes can increase the dissatisfaction of military personnel. The power of the forces defending the state is weakened to the greatest extent if military personnel are dissatisfied.

14. I believe that the Decision of the Constitutional Court is based on erroneous starting points for the assessment and that it absolutises the defence duty to such an extent that it prevails over other constitutional (human) rights even in peacetime. In the [decision in the] case at issue, the defence duty excludes the right of the military personnel to strike. In light of the mentioned arguments, I disagree with the majority decision.

Dr Etelka Korpič – Horvat
Judge

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[1] By the term “passive defence” I understand the situation in peacetime, whereas by the term “active defence” I understand the situation during war, when a strike is prohibited by the fourth paragraph of Article 99 of the DA.
[2] I must add that in the current formation of the Slovene Armed Forces there are no military conscripts performing military service in peacetime.
[3] See Decision of the Constitutional Court No. U-I-123/11, dated 8 March 2012 (Official Gazette RS, No. 22/12).
[4] See the Dissenting Opinion of Judge Krivic regarding Decision of the Constitutional Court No. U-I-193/93, dated 7 April 1994.

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