

# THE PRINCIPLE OF SUBSIDIARITY IN THE CONTEXT OF CRIMINAL LAW PROTECTION OF WORKERS : A CROATIAN PERSPECTIVE

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## THE PRINCIPLE OF SUBSIDIARITY IN THE CONTEXT OF CRIMINAL LAW PROTECTION OF WORKERS – A CROATIAN PERSPECTIVE

### *Abstract:*

*The paper deals with criminal labour law as a field that has been unduly neglected in the Republic of Croatia, not only at legislative, but also at practical and theoretical level. The authors analyse the provisions of the title referring to criminal offenses against labour relations and social security, which was introduced into Croatian legislation in 2013. The introduction of a new title of criminal law legislation is a sign of enhanced criminal law protection of rights arising from labour relations and social security. However, there have been some complaints about the provisions in question, coming not only from among employers, but also from trade unions. Taking into account the objections raised by social partners, the authors try to give a critical review of this matter through the prism of one of the pivotal principles of criminal law - the principle of subsidiarity. In this context, the three most controversial criminal offenses from the title in question are analysed, i.e., a violation of the right to work, failure to pay wages and harassment at work, and it is assessed whether these criminal offenses are designed in accordance with the principle of subsidiarity. In conclusion, the authors give some suggestions in favorem improvements of Croatian criminal labour law de lege ferenda.*

**Keywords:** *subsidiarity, fragmentation, material element of a criminal offense, employment, dismissal, harassment, wage, discrimination, corruption*

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## I. INTRODUCTION

Labour legislation in the Republic of Croatia is often criticised as “inflexible” and “strict”. It is stated *inter alia* that “rigidity” of the existing system enables a worker to be overprotected against dismissal, that temporary employment is difficult, that the legal regulation of working time is insufficiently adaptable to the needs of modern work processes, and that a rigid system of employment protection legislation and lack of market flexibility are the biggest obstacles to attracting foreign investments and increasing employment. Therefore, the legislator is required to adopt more liberal regulations.<sup>1</sup> At this point, we will not deal with dissonance between social partners on whether criticism of one or the other side is related to the advocacy of a higher degree of flexibility in labour law, representing the achievements of neoliberal legislation or a power struggle in which trade unions insist on rigid legislation as the last powerful means they really have at their disposal.

The relevant discussions have so far been focused mainly on the labour law perspective. However, with the entry into force of the new Criminal Code on 1 January 2013 and the introduction of a new title of the ‘Criminal offenses against labour relations and social security’ (Title XII), the labour law controversy was extended to the field of criminal law. Namely, the new Criminal Code has significantly expanded the scope of legal protection of workers’ rights. As expected, such turn was met with harsh criticism of the Croatian Employers’ Association (hereinafter referred to as: the ‘CEA’), which, during public discussion, proposed deletion of several provisions. It was emphasised that all workers’ rights that are protected under the Criminal Code are already sufficiently protected by other areas of law. Consequently, the proposed regime will contribute further, as they mentioned, to rigidity of a too rigid normative framework that regulates the rights of workers<sup>2</sup>, and deepen the problems at the implementation level.

On the other hand, union representatives also expressed their dissatisfaction, holding that the changes did not reach a satisfactory level of legal protection of labour and social rights. In their opinion, the national trade union centres proposed a series of changes that would further deepen criminal law repression in this area.<sup>3</sup>

One of the basic principles of criminal law is the principle of subsidiarity, which states that we may reach for criminal law protection only if sufficient protection cannot be

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<sup>1</sup> For more details about the need to harmonise criminal law protection of workers with economic trends, see: V. Grozdanić, M. Škorić and I. Martinović, ‘Kaznenopravna zaštita radnika prema odredbama novog kaznenog zakona’, *Hrvatski ljetopis za kazneno pravo i praksu*, vol. 19, no. 2, 2012, pp. 474-477.

<sup>2</sup> Cf. Opinion of the Committee for legislation, collective bargaining and the protection of rights of the Economic and Social Council, dissenting opinion of the Croatian Employers’ Association, pp. 1-4; available at: <http://www.socijalno-partnerstvo.hr/UserDocsImages/Mi%C5%A1ljenje%20PovjerenstvaKona%C4%8D-ni%20prijedlog%20Kaznenog%20zakona.pdf> (accessed on 22 November 2015).

<sup>3</sup> Cf. *ibid.*, pp. 4-7.

achieved by some other (milder) branches of law.<sup>4</sup> The aim of this paper is to test the following hypothesis: does the new Criminal Code violate the principle of subsidiarity and does this contribute to even greater rigidity of labour legislation in the Republic of Croatia? In the elaboration of this issue, we will analyse the provisions of the new Criminal Code and, where appropriate, other relevant provisions of Croatian legislation. We will evaluate those provisions from two perspectives: nomotechnical refinement and practical feasibility. Based on results of the analysis, we will provide an array of our own answers to the given question. The paper is structured as follows: firstly, we clarify the principle of subsidiarity as a managerial principle that the legislator has to bear in mind in the approach to the standardisation of a particular criminal law related matter. Attention is drawn to the limitations set by this principle, and then the three most controversial criminal offenses against labour relations and social security are analysed, i.e., a violation of the right to work, failure to pay wages and harassment at work. An assessment of compliance with the principle of subsidiarity is provided for each of the specified criminal offenses. We will also look at the problems that could, in our opinion, arise in practical applications of the analysed provisions. In conclusion, we will assess whether the existing legal solution is in accordance with the principle of subsidiarity and give a few suggestions for possible improvement of Croatian criminal and labour legislation *de lege ferenda*.

## II. THE PRINCIPLE OF SUBSIDIARITY AS A MANAGERIAL LEGISLATIVE PRINCIPLE IN CRIMINAL LAW

When dealing with criminal law regulation in some area, the legislator must take into account the principle of subsidiarity. This principle states that we may reach for criminal law protection only if sufficient protection cannot be achieved by some other, less repressive branch of law. In this context, we talk about criminal law as a last resort or *ultimae rationis* of social protection.<sup>5</sup> Fragmentation builds on the principle of subsidiarity as a fundamental characteristic of criminal law, which implies that criminal law protects only the highest social goods and only against the most difficult forms of assault, while the rest is left to other branches of law. This means that, whenever possible, criminal law lets regulation of unlawful conduct primarily to misdemeanour law, and then also to other branches with less repression against norm violators. The importance of the principle of subsidiarity can be seen in the fact that it is proclaimed in Article 1 of the Criminal Code as the basis and the limitation of legal force and it is proposed as a managerial principle of correct interpretation of certain provisions of the Criminal Code as well as for the delineation between misdemeanours and criminal offenses.<sup>6</sup>

<sup>4</sup> P. Novoselec and I. Bojanić, *Opći dio kaznenog prava*, Fourth edition, Pravni fakultet u Zagrebu, 2013, p. 8.

<sup>5</sup> Novoselec and Bojanić, p. 8.

<sup>6</sup> Cf. K. Turković (ed.) et al., *Komentar Kaznenog zakona*, Narodne novine, Zagreb, 2013, p. 28.

It is clear from the aforementioned that the difference between a criminal offense and other forms of prohibited conduct is of qualitative nature and it is reflected in a higher level of social danger. In the literature in German, this danger is also expressed as the worthiness of punishment (or *Strafwürdigkeit*) so that the criminal offense itself is understood as a “quasi-right worthy of punishment”.<sup>7</sup> In this case, criminal sanctions appear to be the only adequate means of restoring legal order. This raises the question of criteria used for such legislative assessment. For the purpose of this paper, we will accept the criterion proposed by Jescheck and Weigend, according to which the worthiness of punishment depends on the following three elements: the value of the protected legal good, the danger of an assault and a degree of the intent of the perpetrator to commit a crime.<sup>8</sup> In what follows, we assess these criteria in relation to the relevant criminal offenses in Title XII of the Criminal Code.

### III. CRIMINAL LAW PROTECTION OF WORKERS IN THE REPUBLIC OF CROATIA AND THE PRINCIPLE OF SUBSIDIARITY

Labour rights and social rights were protected by Croatian legislation in the past, primarily through the provisions of labour and misdemeanour law, but also, to a very limited extent, by the provisions of criminal law. By adopting the Criminal Code in 2013, the legislator significantly expanded the criminal dimension. Such tightening is not a curiosity of Croatian criminal law, but it can be observed in some other European legal systems as well.<sup>9</sup> Below we describe a new regulatory framework and apply the defined criteria of subsidiarity to legal provisions. We will also mention a few problems that we believe could constitute an obstacle to a successful practical application.

#### 3.1. Normative framework

Fragments of criminal law protection of the rights of workers existed in the 1997 Criminal Code as well, within the framework of criminal offenses against the freedom and rights of man and of the citizen. We refer here to “fragments” because there were only two criminal offenses, i.e., *a violation of the right to work and other rights arising from employment*

<sup>7</sup> Cf. H.-H. Jescheck and T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil, 5. vollständig neubearbeitete und erweiterte Auflage*, Berlin, Duncker & Humblot, 1996, § 7/I, pp. 49-50.

<sup>8</sup> Jescheck and Weigend, p. 51.

<sup>9</sup> For example, German criminal law has been characterised lately by a tendency towards tightening and criminal and labour law is getting more important. For more information on this issue, see: B. Gercke, O. Kraft and M. Richter, *Arbeitsstrafrecht, Strafrechtliche Risiken und Risikomanagement*, Heidelberg, München, Landsberg, Frechen, Hamburg, C. F. Müller, 2012, 1. Kapitel, pp. 22-24.

and a violation of health and disability rights. The new code applied a more systematical approach to this matter and, as we have pointed out in the introduction, provided for a special title with five criminal offenses. Some of them are completely new, whereas some modify the old solutions. It should be noted that separation of labour related criminal offenses is not a complete novelty in Croatian criminal legislation. Such a solution existed in the old Criminal Code of the Republic of Croatia. In this regard, we believe this separation into a special title is positive because it generated a double benefit. On the one hand, it provided transparency and a clear definition of the protected legal goods. On the other hand, the new (old) solution is a kind of return to the Croatian criminal law tradition.

The new title contains five criminal offenses. These are as follows: a violation of the right to work (Article 131), failure to pay wages (Article 132), harassment at work (Article 133), a violation of the right to social security (Article 134) and illegal employment (Article 135). At this point, we will not engage in a detailed analysis of all these criminal offenses, but rather concentrate on the three criminal offenses that have caused the greatest controversies and prompted the introductory problem question. These are a violation of the right to work, failure to pay wages, and harassment at work.<sup>10</sup>

#### a) Violation of the right to work

This criminal offense existed in Article 114 of the 1997 Criminal Code. The scope of criminal law protection has been significantly expanded in two directions by the new Criminal Code. Firstly, it provides for an imprisonment of up to three years for an employer who terminates an employee's contract of employment because "*in good faith and on reasonable suspicion of corruption, he/she addressed or reported thereon*" to the competent authorities. The *ratio legis* of this provision was to achieve enhanced protection for the so-called whistleblowers.<sup>11</sup> Secondly, it introduced culpability of an employer who dismisses a worker participating in a lawful strike. This provision is adjusted to Article 215 of the existing Labour Act (hereinafter referred to as: the 'LA').<sup>12</sup>

During public discussion, the CEA criticised the provision on enhanced protection for whistleblowers. They pointed out that it is sufficient to regulate this protection through the sanctions stipulated by the LA. However, this view was not explained in detail. It was only briefly mentioned that sufficient protection is achieved by regulating such behaviour as one of the gravest types of violations by employers.<sup>13</sup>

<sup>10</sup> It should be mentioned that these criminal offenses have already provoked scientific analyses of high quality in the Croatian literature. See Grozdanić, Škorić and Martinović, pp. 473-499.

<sup>11</sup> Grozdanić, Škorić and Martinović, p. 496.

<sup>12</sup> Zakon o radu, *Eng.* Labour Act, Official Gazette, no. 93/14.

<sup>13</sup> Opinion of the Committee for legislation, collective bargaining and the protection of rights of the Economic and Social Council, dissenting opinion of the Croatian Employers' Association, pp. 1-4.

At this point, we would like to draw attention to two important circumstances. First of all, although the new provision emphasises whistleblower protection, it should be said that such protection was also provided pursuant to the 1997 Criminal Code. In fact, Article 114 of the 1997 Criminal Code contained a very vague formulation under which different types of behaviour could be classified, including dismissal on the grounds of whistleblowing. However, to the best of our knowledge, no such criminal proceeding has been initiated in practice. In addition, we believe that the new provision narrowed the scope of legal protection of whistleblowers because a criminal offense is limited to dismissal for the reporting of *corruption*. Corruption is not defined in the Criminal Code. On the other hand, the Act on the Office for the Suppression of Corruption and Organised Crime limits corruption to only a few criminal offenses. This means that in the case of reporting other criminal offenses (such as forgery, sexual offenses, harassment at work, and the like), the employer may dismiss a worker without any sanction in criminal law! A different interpretation would imply a form of prohibited analogy to the detriment of the perpetrator of a criminal offense. This raises the problem of insufficient specificity of the legal text, which is not in accordance with the principle of *nullum crimen sine lege certa* as one of the postulates of the principle of legality. It should be added that pursuant to Article 117(3) of the Labour Act adopted one year after the Criminal Code, *the worker's approach to the competent persons or state authorities on the grounds of reasonable suspicion of corruption or his/her report in good faith on the said suspicion shall not constitute a just cause for dismissal*, which is a result of horizontal harmonisation of national regulations. In fact, the absence of horizontal harmonisation of national legislation, use of different terminology, incompatible definitions of certain legal institutes in different regulations, particularly those transposed from EU legislation, are the most common reasons why it is difficult to obtain legal protection and why in the implementation of such regulations it is necessary to have highly developed competencies of judges and lawyers in relation to legal interpretation.

Stipulation of the present Criminal Code provision clearly suggests that those workers who did not act in good faith, i.e., those who abused the criminal law framework aware of the fact that the employer did not act and operate corruptly, will not be able to exercise criminal law protection. This refers to cases where there are no reasonable grounds for these statements by workers. In this sense, judicial practice will *inter alia* have to answer the question as to what is considered under acting in "good faith" and based on "reasonable grounds" because filing a feigned motion violates the relationship of trust between an employer and an employee, causes serious damage to a company's reputation and should result in termination of the employment contract without negative consequences for the employer in the context of both criminal law solutions and provisions of relevant labour legislation. However, in dubious circumstances and without interpretations of acting in good faith and with a reasonable doubt, which are founded on case law, the question arises as to whether the court will succumb to the principle *in dubio pro reo* in favour of workers. Hence there is an additional debate on whether the right to work is a right that



can be used by an employee against his/her employer, as researched in the eighties of the last century by Bob Hepple, and reviewed today by Joanna Howe.<sup>14</sup> In this context, we find interesting an Australian court case of *Thomson v Broadley*<sup>15</sup>, in which a former employee, who was fired because, as a whistleblower, he reported his employer for alleged illegal activities and illegal practice in the conduct of business, claims that, due to stigmatisation, he is not able to find another job and thus demands material compensation. However, the claim failed due to lack of evidence of corrupt and dishonest business practices of the former employer, as well as lack of evidence of any relation between “limited abuse of the employer” and the inability to find a new job.<sup>16</sup>

When thinking of workers acting in good faith and with a reasonable suspicion of corruption in the conduct of business of their employers, a question naturally arises as to whether such a claim should be supported, endorsed or strengthened by a trade union or a workers’ council if they are constituted and operate in the company, i.e., a large group of workers<sup>17</sup>, which might have an impact in the public and governmental service systems, but it is questionable whether this would be possible in privately owned companies and in small businesses.

Keeping in mind the aforementioned, we can conclude that the new Criminal Code indeed pointed out the problem of whistleblower protection as an especially vulnerable category of workers, but at the same time, it narrowed the scope of application with respect to Article 114 of the 1997 Criminal Code. If we put this into context with our working hypothesis and set criteria, we conclude that in this segment the legislator has not violated the principle of subsidiarity because criminal law protection is narrowed only to situations related to the reporting of corruption as one of the most dangerous forms of crime in the public and private sectors. Therefore, in our opinion, this change has not made domestic criminal law more rigid, but it was left to labour legislation and judicial practice to penalise other reasons for unfair dismissal. One can therefore say that the disputed provision has made criminal labour legislation more selective in the approach. It would be appropriate *de lege ferenda* to precisely define corruption, or compile an exhaustive list of criminal offenses that would be categorised under this term which is insufficiently defined in criminal labour and criminal law regulation.

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<sup>14</sup> B. Hepple, ‘A Right to Work’, *Industrial Law Journal*, vol. 10, no. 1, pp. 65-83; J. Howe ‘Why Do So Few Employees Return to their Jobs? In Pursuit of a Right to Work Following Unfair Dismissal’, in V. Mantouvalou (ed.) *The Right to Work. Legal and Philosophical Perspectives*, Oxford and Portland, Hart Publishing, 2015, pp. 255-274, 255.

<sup>15</sup> *Thomson v. Broadley* [2002] QSC 255.

<sup>16</sup> P. Weeks, ‘Employment Law – A Test of Coherence Between Statute and Common Law’, in S. Corcoran and S. Bottomley (eds.), *Interpreting Statutes*, Sydney, The Federation Press, 2001, p. 191.

<sup>17</sup> Howe, pp. 266-269.



## b) Failure to pay wages

Failure to pay wages was covered by Article 114 of the 1997 Criminal Code. The new Criminal Code has just placed it into a specific provision (Article 132) and specified the content of this criminal offense. However, since the new provision is relatively extensive, we will not engage in a detailed analysis, but focus on the most controversial part. In particular, these are paragraphs 1 and 2, which criminalise non-payment of wages in cases where the employer is solvent or is intentionally brought to a state of insolvency in order to avoid payment of wages. They also provide for the employer who subsequently pays all arrears of wages to be exempted from paying the fines (this is so-called effective regret).

This criminal offense was met with harsh criticism of both the CEA and the national trade union centres. The CEA strived to delete the entire article from the Criminal Code. If this were not accepted, they also suggested that criminal liability should be confined to cases of non-payment of wages for the purpose of securing unfair or unlawful gain to themselves or other persons, on the grounds that in the event of non-payment of wages a worker has a number of other legal options available (to cancel the contract of employment, to initiate enforcement proceedings on the basis of a pay slip, to go on strike, to initiate bankruptcy proceedings and to file a complaint against the employer with the Labour Inspectorate).<sup>18</sup> On the other hand, the trade unions believed that failure to pay wages should be a criminal offense, regardless of the reasons that led to non-payment (as it threatens the existence of workers) and that the provision on effective regret should be deleted (as it allows the unpunished repetition of the criminal offense in question).<sup>19</sup> The legislator did not take criticism and recommendations and legalised the original proposal.

We will look at this issue from the perspective of the principle of subsidiarity. First of all, it should be mentioned that failure to pay wages was covered by the general provision of Article 114 of the 1997 Criminal Code, which means that the legislator did not introduce but only modified the existing form of criminal law protection. The new provision specifies the characteristics of a criminal offense and stresses the importance of this form of protection. The legislator was clearly led by statistical data referring to a large number of employers who do not pay wages<sup>20</sup> and by thinking that a repressive provision can

<sup>18</sup> Opinion of the Committee for legislation, collective bargaining and the protection of rights of the Economic and Social Council, pp. 1-4.

<sup>19</sup> Opinion of the Committee for legislation, collective bargaining and the protection of rights of the Economic and Social Council, pp. 4-7.

<sup>20</sup> The list of taxpayers/employers that, according to available data, fail to pay wages is given separately for legal and natural persons at: <http://www.porezna-uprava.hr/bi/Stranice/Neisplatiteljiplaca.aspx> (accessed on 20 November 2015). The list contains 7,584 employers - legal persons and 1,921 employers - natural persons in the period from January to December 2014, which, according to official data of the Ministry of Finance, failed to pay wages to their workers. The list does not include employers who did not submit the JOPPD form, those who failed to pay wages in three consecutive months or in three months within

have a psychological effect on reducing and combating undeclared work, demonstrating that relevant provisions of labour legislation are not sufficient for that.<sup>21</sup> One should not underestimate the fact that, from the point of view of labour law, payment of wages is counter-prestation for the work done,<sup>22</sup> i.e. recoverability/onerosity is one of the essential elements of labour relations that can differentiate it from other forms of work in which there is no recoverability as a result of the existence of other forms of (non-free) work - forced or slave labour, which are sanctioned through other provisions of criminal law, or international sources.<sup>23</sup>

Furthermore, three important circumstances should also be noted. Firstly, a criminal offense exists only in the case of non-payment of wages as the *gravest* type of assault on the protected legal good. Other types of assault, such as denial of the right to work time and rest breaks at work as regulated by law, illegal orders related to overtime, not keeping records of workers and their working hours, lack of written contracts of employment, refusing to hire a pregnant woman or changes to a contract of employment under unfavourable conditions referring to a pregnant woman, a woman who has given birth or a breastfeeding woman, etc., are contained in misdemeanour provisions of the Labour Act. In this context, the fragmentary nature of criminal law is especially emphasised here.

Secondly, only those employers who are either solvent or have intentionally brought about insolvency are punished. This actually means only employers are punished who act with *direct intention* as the most serious form of guilt. This solution gives rise to the following dilemma: does this mean that only those operating successfully in the market shall be punished, while those that are insolvent can freely generate further losses without any consequences? If so, then the existing legislation is untenable because it puts solvent employers in an unfavourable position, which is discriminatory and contrary not only to the principle of subsidiarity as a basic principle of criminal law, but also to the constitutional

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the period of the last six months, as well as those who failed to pay wages for the period before 1 January 2014, because before the introduction of the JOPPD form, the Tax Administration did not have analytical data/tools on the payment of wages. In other words, the figures are much higher. In the period between January and April 2014, there were 29,398 workers who did not receive their salaries (The labour market in Croatia, the Ministry of Labour and Pension System, available at: <http://www.mrms.hr/wp-content/uploads/2014/06/sibenik.pdf>) (accessed on 20 November 2015).

<sup>21</sup> Wages are primarily governed by the provisions of Articles 90-97 of the Labour Act, while pursuant to Article 229(1)(34) of the same Act, the situations in which an employer fails to deliver to the worker a pay slip for an unpaid wage, benefit or severance pay, or if such accounting has no predetermined content, are qualified as the gravest types of violations of the employer.

<sup>22</sup> I. Grgurev 'Ugovor o radu', in Ž. Potočnjak (ed.) et al. *Radni odnosi u Republici Hrvatskoj*, Zagreb, Organizator and Pravni fakultet u Zagrebu, 2007, pp. 12-18.

<sup>23</sup> A. Ravnić *Osnove radnog prava – domaćeg, usporednog i međunarodnog*, Zagreb, Pravni fakultet u Zagrebu, 2004, pp. 76-92. See also J. Penner 'Aristotle, Arendt and the Gentleman: How the Conception of Remuneration Figures in our Understanding of a Right to Work and Be Paid', in V. Mantouvalou (ed.) *The Right to Work. Legal and Philosophical Perspectives*, Oxford and Portland, Hart Publishing, 2015, pp. 87-97.

principle of equality of all before the law. Therefore, this provision should *de lege ferenda* be changed so as to cover all employers, regardless of their solvency.

Thirdly, there is a possibility of effective regret, which means that until the last moment the perpetrator can avoid punishment. Effective regret is an institute which provides for certain privileges to the perpetrators who give up a criminal offense following its formal completion and prior to its substantial completion.<sup>24</sup> These privileges are within the sphere of punishment and they most frequently include a more lenient punishment or exemption from punishment. In this case, the legislator provides for the possibility of acquittal, but that possibility also implies the possibility of unlimited mitigation in sentencing, which means that the repressive measure in this area is partially offset.

Taking all this into consideration, there is a legitimate question whether the purpose and the objective to be achieved by punishment are proportional to the means used. In other words, the question is whether the legislator has taken into account the proportionality test and impact assessment of that legal norm. Is effective regret a way to avoid sanctioning in almost all cases? If so, then what is the meaning of the provision? Not to mention the psychological effect of the provision, or a nomotechnical construct, subsumed in this way, which can be pretty demotivating for solvent and commercially successful employers. Is this alternatively “sanctioning” of capital under the aegis of “the sin of capital” that is perceived through the recent discourse of domination of economic freedoms over social rights? Or, a social context of Europe has not been reflected here in an interdisciplinary and functional sense at all. If part of the answers to these questions is yes, then despite all criticisms that are partially justified, there is a reasonable premise of a daily political function of “flattering” one or the other social partner through the nomotechnical and semantic mechanism. Moreover, by neglecting the proportionality test, the given norm is categorised as an explicit threat of the criminal justice system to the world of capital, which was created *ab ovo* through an impotent mechanism that will most likely not affect the improvement in the situation faced by the workers in these cases. Bearing this in mind, it should be considered *de lege ferenda* whether this criminal offense should be kept in this form or whether it would be more purposeful, guided by the principle of subsidiarity, to leave this area to milder branches of law.

### c) Harassment at work

This is a new criminal offense. It incriminates harassment in the workplace, known as mobbing.<sup>25</sup> Long-term research on and monitoring of mobbing in foreign and Croatian

<sup>24</sup> Novoselec and Bojanić, pp. 315-316.

<sup>25</sup> The word *mobbing* is derived from the Latin phrase *mobile vulgus* ('the fickle crowd'). For more information on the word, see: D. Rittossa, M. Trbojević Palalić, 'Kaznenopravni pristup problematici mobbinga', *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 28, no. 2, 2007, pp. 1326-1327.

literature, numerous studies, as well as relevant case law, have not resulted in a unique and universally accepted definition of mobbing yet. In the available literature it is possible to identify a number of terms used almost interchangeably, although experts in this field distinguish between them more precisely. Terms like *emotional violence*, *harassment*, *sexual harassment*, *emotional abuse*, *mobbing*, *bullying*, *psychoterror in the workplace*, *psychological abuse in the workplace*, are mentioned frequently, for which most readers *prima facie* notice that these are similar but not always identical behaviours. Germany and the Nordic countries have adopted the term “mobbing”, while in Australia, Ireland and the UK the term “bullying” is used as a synonym more frequently.<sup>26</sup> Bullying often refers to individual cases of harassment and mobbing includes collective forms.<sup>27</sup> Leymann, who can be called the father of research on psychological abuse in the workplace, is more precise in determining the concepts. By analysing behaviour at school, he points out that strong elements of physically aggressive behaviour are expressed in *bullying*, while sophisticated and repetitive behaviour with adverse treatment or adverse pressure on an individual employee is typical of mobbing.<sup>28</sup> Since the beginning of the eighties of the last century, Leymann’s research on mobbing has resulted in revolutionary analyses of the problem in the medical and psychological literature, as well as multidisciplinary scientific analyses and studies, and a few decades later, in its identification as a predominantly separate legal institute in a number of national legislations. Thanks to the aforementioned scientist, an operational definition of *mobbing* was created, whose elements are used by experts in the field and recent case law. According to this operational definition, “*psychological terror or mobbing in the workplace involves hostile and unethical communication, which is directed in a systematical way, by one or a few individuals mainly towards one individual who is, due to mobbing, pushed into a helpless and defenceless position, being held there by means of continuing mobbing activities.*”<sup>29</sup> Hence *mobbing* represents a form of behaviour in the workplace in which an individual or a group of persons systematically, over longer periods of time, psychologically abuse another person with a view to violating human dignity, integrity, reputation and honour.<sup>30</sup> Given a huge range of behaviours that fall within the

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<sup>26</sup> V. Di Martino, ‘A cross-national comparison of workplace violence and response strategies’, in V. Bowie, B. S., Fisher and C. L. Cooper (eds.), *Workplace violence - issues, trends, strategies*, Devon, Willan Publishing, 2005, p. 21.

<sup>27</sup> Di Martino, pp. 21-22.

<sup>28</sup> H. Leymann, ‘Mobbing and Psychological Terror at Workplaces’, *Violence and Victims*, vol. 5, no. 2, 1990, pp. 119-126.

<sup>29</sup> H. Leymann, ‘The Content and Development of Mobbing at Work’, in D. Zapf and H. Leymann, (eds.) *Mobbing and Victimization at Work*, *European Journal of Work and Organizational Psychology*, vol. 5, no. 2, 1996, pp. 165-184.

<sup>30</sup> Leymann *Mobbing and psychological terror at workplaces*, pp.119-126.

scope of the definition, it may be best to use the term the *mobbing syndrome*,<sup>31</sup> a characteristic of which is the specific developmental dynamics. In the beginning, there is unresolved conflict, which gradually turns into aggressive tendency towards others aimed at attacking and punishing, victims become clearly marked, isolated and objects of ridicule in their workplaces. By various forms of psychological, and sometimes also physical, abuse, a victim of mobbing becomes “marked” and is presented as a problem in the working environment.<sup>32</sup>

The *ratio legis* of the provision is to protect workers from long-term harassment in the workplace that can lead to multiple and lasting consequences, not only for workers themselves but also for their families. The results of the Sixth European Working Conditions Survey show that in the EU in 2015, 17% of women and 15% of men were exposed to negative social behaviour, and 7% of all workers experienced some form of discrimination (an increase from 5% in 2005 and 6% in 2010).<sup>33</sup> These statistical indicators definitely include mobbing behaviours, because research clearly shows psychosocial risk factors relating to organisation, management, high demands, labour intensity, emotional demands, a lack of autonomy and poor social relationships and bad leadership. In addition, when it comes to data interpretation, we should not underestimate changes in the structure of employment due to a marked increase in the number of workers in the service industry and, consequently, a decrease in the number of workers involved in the manufacturing sector.<sup>34</sup>

During public discussion, the CEA requested deletion of this provision on the grounds that such behaviour is more precisely defined and sanctioned by the penalty provisions of the Anti-discrimination Act, so that its standardisation in the Criminal Code also leads to different regulation of the same issue and contributes to legal uncertainty.<sup>35</sup> It should be borne in mind that Croatian legislation does not define mobbing at the level of either labour or criminal law, or even anti-discrimination law, and attempts at passing a separate Act on the Prevention of Harassment at Workplace, initiated a decade ago, did not bear fruit

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<sup>31</sup> N. Davenport, R. D. Schwartz and G. P. Elliot, *Mobbing: Emotional Abuse in the American Workplace*, Ames: Civil Society Publishing, 2002; Vinković, M., Vinković, M., ‘Mobbing - Legal and Medical Aspects in the Transitional Society (Case Croatia)’, *Contemporary Legal and Economic Issues*, 2007, pp. 136-149; A. Simonić, V. Šendula-Jengiđ, G. Bošković, ‘*Mobbing u suvremenom društvu*’, in N. Bodiroga-Vukobrat, T. Frančišković and M. Pernar (eds.), *Mobbing*, Društvo psihologa primorsko-goranske županije, Rijeka, 2006, pp. 14-15.

<sup>32</sup> Simonić, Šendula-Jengiđ and Bošković, p. 15.

<sup>33</sup> *First findings: Sixth European Working Conditions Survey*, Eurofound, 23.11.2015, p. 7. Available at: [http://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef1568hr.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1568hr.pdf) (accessed on 25 November 2015)

<sup>34</sup> Sixth European Working Conditions Survey, p. 6.

<sup>35</sup> Opinion of the Committee for legislation, collective bargaining and the protection of rights of the Economic and Social Council, pp.1-4.

either<sup>36</sup>. Legal protection can therefore be achieved only through the provisions related to harassment and the prohibition of discrimination in the Anti-discrimination Act, which are generally harmonised with the *acquis communautaire*, and the provision of the Civil Obligations Act on the protection of personality rights and compensation. However, the implementation of the provisions relating to harassment and discrimination means that harassment is associated with some of the specified legal bases for prohibiting discrimination, which is most commonly not the case with mobbing. Since 2014, the Protection at Work Act<sup>37</sup> has dealt with stress at work as *health and psychological changes which are the result of the accumulating impact of stressors at work over a longer period of time, manifested as physiological, emotional and cognitive reactions and as behavioural changes of the worker*<sup>38</sup> and obligations the employer and the workers or their representatives have in this regard.<sup>39</sup>

Below we evaluate new incrimination in the context of our working hypothesis. The Criminal Code provided for insults, humiliation, abuse and harassment, as modalities of action. Although at first glance they may seem insufficiently specified, these modalities are also contained in many other criminal offenses. This means that case law should have already developed clear interpretations on what actions are covered. Furthermore, the modalities described will be treated as a criminal offense if they are repeated for a long time and if they demonstrate a cause-effect relationship with adverse health effects on workers. It is also highlighted that deterioration of health is not an objective condition of punishability/criminal liability but an integral part of this criminal offense, which means that it must be encompassed by intent on the part of the perpetrator.<sup>40</sup> In this context, this criminal offense should be seen as *lex specialis* with respect to the criminal offense of bodily injury under Article 117 of the Criminal Code, which might also consist in health impairment. This means that there is no possibility of acquisition between these criminal offenses. Analogously to the criminal offense of bodily injury, health impairment must be interpreted restrictively as a cause of a disease or an exacerbation of the medical condition.<sup>41</sup> By introducing the described consequence into the essence of this criminal offense, the domain of criminal liability is relatively narrow, so we can conclude that the legislator

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<sup>36</sup> The 2007 Draft Act on the Prevention from Harassment at Workplace is available on the website of the Croatian Parliament: [www.sabor.hr/fgs.axd?id=7137](http://www.sabor.hr/fgs.axd?id=7137) (accessed on 20 September 2015)

<sup>37</sup> Zakon o zaštiti na radu, *eng.* Protection at Work Act, Official Gazette, no. 71/14, 118/14, 154/14.

<sup>38</sup> Protection at Work Act, Article 3, Para. 1(34).

<sup>39</sup> Protection at Work Act, Article 51 and Article 52.

<sup>40</sup> Turković (ed.) et al., p. 185.

<sup>41</sup> For more information on the concept of health impairment as a characteristic of bodily injury, see: D. Derenčinović, in D. Derenčinović (ed.) et al., *Posebni dio kaznenog prava*, Pravni fakultet u Zagrebu, 2013, pp. 97-98. Also, P. Novoselec, in: P. Novoselec (ed.) et al., *Posebni dio kaznenog prava*, Pravni fakultet u Zagrebu, 2011, p. 35.



wanted to criminalise only the most severe forms of mobbing, which means that the legislator was guided by the principle of subsidiarity.

As we have already emphasised, the aforementioned misdemeanour provisions of anti-discrimination legislation referred to by the CEA, or more precisely, the provisions of the Anti-discrimination Act, reduce mobbing exclusively to discriminatory grounds. Other situations (e.g., abuse of power, jealousy, competitiveness, etc.), which are in practice often not covered by the provisions of that act but by the provisions of the Civil Obligations Act, in particular in the context of infringement of personality rights. However, in Croatia, there are only a few final judgments for mobbing, which are the result of the completed labour disputes. In mobbing as a multi-layered phenomenon, it is necessary to understand the necessity of observing it through the focus of different scientific areas. Some of its definitions are based on the conclusions drawn by psychologists and psychiatrists, others are the result of judicial activity of foreign courts, and some express the views of jurisprudence. It should be noted that different perceptions of mobbing need not substantially fully coincide, but for the legal protection it is necessary to identify the form it can be provided in. In fact, mobbing, which *inter alia* includes physical assault, surpasses the boundaries of a labour dispute and enters the domain of criminal law. The same is also applicable to the situations in which a person was not only mentally abused, but was a victim of sexual assault as well, because the latter will also be in charge of the State Attorney's Office in criminal proceedings in respect of other (potential) criminal offenses. The question of compensation for pecuniary and non-pecuniary damage suffered by the victim is very important in establishing the claim, and, in addition to confirming the existence of mobbing, it is important to order termination of mobbing activities or establish infringement of personality rights. Therefore, we should bear in mind that in cases of mobbing, legal protection can be achieved through the provisions of labour, civil and criminal law.

If we take all this into consideration, we can conclude that the Criminal Code has filled the current void by incriminating possible forms of horizontal and vertical mobbing based on reasons other than those related to the legal basis of non-discrimination. It clearly delineates punishment from misdemeanour responsibility by stipulating that the behaviour must be repeated and that it must cause health impairment. In this way, lighter cases of mobbing are left to be handled by misdemeanour law, while criminal law provides for (the most) more serious forms. It is clear from this that the new provision does not violate the principle of subsidiarity of criminal law. Moreover, the above provision bridges the gap because the Croatian legal system is not familiar with a legal definition of mobbing, so that, as we have already pointed out, it needs to be proved by means of provisions relating to the prohibition of harassment and discrimination contained in the Anti-discrimination Act and/or the provisions relating to infringements of personality rights and compensation for non-pecuniary damage contained in the Civil Obligations Act. By the aforementioned decision the legislator followed the practice of Belgian and French criminal law in



terms of moral harassment in the workplace,<sup>42</sup> but let prosecution of this criminal offense upon motion of the victim of abuse.

### 3.2. Potential problems of the practical feasibility

At this point, we would like to emphasise a few more problems that were not discussed in the Croatian literature earlier and that we believe may arise in practice, and impede or prevent the application of legal provisions. The Croatian case law has traditionally been sceptical about the changes brought by modern development of criminal law. When we talk about criminal labour law, we can point out the following problems that we hold relevant: the amount of prescribed penalties, possible difficulties in proving and prosecution of workplace harassment upon motion.

In terms of the amount of prescribed penalties, we can see that the penalties for criminal offenses under this title are relatively low. The maximum upper limit for a criminal offense related to undocumented/illegal employment under Article 135 of the Criminal Code is five years' imprisonment, while for other criminal offenses the penalties are up to two or three years. This issue is at the same characterised by lack of logic. For example, this illegal employment obstructed a more severe penalty than for workplace harassment, even though in addition to labour rights, the latter also infringes health as one of the highest personal goods. Such low penalties make imposed penalties to be low as well, which will in practice lead to a higher share of suspended sentences for these criminal offenses. If we add the aforementioned effective regret in relation to non-payment of wages under Article 132(4), it is obvious that the legislator placed emphasis on special prevention. Unlike this, German law, for example, has recently recorded a noticeable trend of imposing more severe punishments for labour related criminal offenses, with special emphasis placed on general prevention.<sup>43</sup> Although the principle of subsidiarity was obviously taken into account, we can question the purposefulness of such solution due to which one gets the impression that this title of the Criminal Code has been marginalised.

Furthermore, we believe that it will be difficult, if not impossible in practice, to prove some of the criminal offenses from this title. This objection primarily relates to the criminal offense of harassment at work in which it will be necessary to prove two key conditions: the causal link between harassment and health impairment as well as the fact that such impairment was caused by intent on the part of the perpetrator, which means that the perpetrator was aware of such consequence or at least agreed to it.

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<sup>42</sup> R. Pražetina Kaleb, 'Oblici mobinga i sudska zaštita žrtava mobinga', *Policija i sigurnost*, vol. 21, no. 4, 2012, pp. 828-830.

<sup>43</sup> For more information, see: B. Gercke, O. Kraft and M. Richter, *Arbeitsstrafrecht, Strafrechtliche Risiken und Risikomanagement*, Heidelberg, München, Landsberg, Frechen, Hamburg, C. F. Müller, 2012, 1. Kapitel, pp. 27-28.

The third issue that we believe has to be emphasised is the fact that harassment at work proceedings are to be taken upon motion of the injured party (Article 133(2) of the Criminal Code). Such a proposal implies a much greater involvement of injured parties than the mere filing of criminal charges because criminal charges can also be filed anonymously, whereas filing a motion implies disclosure of the identity of the applicant and thus presents a greater risk to the injured party who may still be employed by the same employer and may be subject to different kinds of pressure. Therefore, we believe that such solution will result in a small number of procedures so that we should *de lege ferenda* consider that the proceedings are initiated *ex officio*.

#### IV. CONCLUSION

In conclusion, we can state that the Croatian legislator certainly made an important step towards the modernisation of criminal labour law. The domain of criminal liability has been considerably extended by introducing a new title into the Criminal Code and incriminating new criminal offenses. However, there is still plenty of room for improvement.

In the context of the questions analysed in this paper - whether new solutions are in accordance with the principle of subsidiarity - we came to the conclusion that the legislator mainly took into account this principle and reserved criminal law protection only for the most serious cases. Moreover, we can see that in certain cases there was no room for a further extension of the scope of that protection. This mainly refers to a violation of the right to work, which is unduly limited only to cases of reporting corruption, and to harassment at work, for which, in our opinion, the prescribed penalty is too low and it is conceived in such a way that it would be very difficult to prove the requisite intent.

On the other hand, in our view, the principle of subsidiarity is not sufficiently appreciated in the case of failure to pay wages. This is so primarily because only those employers are punished who do business regularly and are solvent. This solution is also discriminatory and therefore unsustainable and must be changed in the future. Moreover, it raises the question whether it meets the proportionality test and whether the desired *ratio* has been achieved by this regulation.

Bearing all the above in mind, we can conclude that strengthening the emphasis on criminal law protection of labour and social rights is certainly to be welcomed. However, we should bear in mind that the principle of subsidiarity in labour related criminal offenses has not been achieved to the full extent. Thus this should certainly be taken into account in future revisions of the Criminal Code.