

## CONSIDERATIONS ON SEXUAL HARASSMENT

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**ABSTRACT:** *The promotion of equal opportunities and non-discrimination constitutes one of the priorities of the EU member states and is incorporated in the numerous directives that regulate gender equality.*

*Traditionally, sexual harassment consists of unwanted behaviour of a sexual nature, which affects the dignity of the victims. The victims of sexual harassment can be both women and men, just as the harasser can be of both sexes but, in the great majority of cases, as it stands out from the available studies, women are the victims.*

*In Romania, sexual harassment was considered a trifle of the feminists that wanted to draw attention to themselves and was sometimes treated as a normal behaviour. Therefore, its incrimination in the Romanian legislation represented an obvious progress, with the purpose of repressing the behaviours through which employment, continuation, or promotion in a given office are conditioned by providing sexual satisfaction.*

**KEY WORDS:** *sexual harassment, victims, sexual satisfaction, gender equality*

**JEL CLASSIFICATION:** *K14*

### 1. INTRODUCTION

Sexual harassment consists of unseasonable behaviour that affects the dignity of the victims. Traditionally, sexual harassment has been defined as "unsolicited contact or sexual behaviour that adversely affects the work environment". This type of behaviour occurs most frequently in the workplace and can manifest physically, verbally, or nonverbally (Mocanu, 2011, p. 207; Chilea, 2011, p. 146). It has negative effects both on the person harassed and on the institution that person works for, since questions relating to professional training and development, payment, or promotion are no longer decided objectively, but are affected by the behaviour of the harasser. Some of the most visible effects that sexual harassment can have on the victims include decreased work performance, lack of motivation, lack of attachment to the organization, lack of initiative, and loss of promotion opportunities. No less important are the psychological effects (depression, stress, sleep disorder, insecurity, isolation, self-blame) or those effects which

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manifest physically<sup>1</sup> (headaches, fatigue, palpitations, sexual dysfunctions, hormonal disorders, weight fluctuations, etc.) (Chilea, 2011, p. 146).

Both men and women can become victims of sexual harassment, just as harassers can be of both sexes. A man can sexually harass both men and women, just as a woman can harass either a man or a woman, but the large majority of cases involve women as victims. (Westheimer, f.a., p. 154; Chilea, 2011, p. 146).

Sexual harassment is a manifestation of the desire for power and aggression, as a result of the perpetuation of certain "traditional sexual stereotypes" (Mocanu, 2011, p. 207).

As shown by the doctrine, the term "sexual harassment" appeared in the United States of America (Dobrinioiu, Brânză, 2002, p. 22; Vasiu, 2011, p. 194). According to the United States Civil Rights Act of 1964<sup>2</sup> which prevents sexual discrimination, sexual harassment is illegal<sup>3</sup>. The U.S. Supreme Court has defined two types of sexual harassment, namely: "*quid pro quo sexual harassment*" or advantage offered in exchange for another, and the "hostile work environment sexual harassment".

"*Quid pro quo*" sexual harassment occurs when a specific aspect relating to the workplace (promotion, specific professional development opportunities, etc.) depends on a particular sexual behaviour. According to RK Westheimer, the prototype of this type of harassment is represented by the man in a superior position telling the woman subordinate "if you sleep with me, you will be promoted; if not, you'll be fired." "Hostile work environment" sexual harassment occurs when the atmosphere in the workplace is disagreeable and makes a person feel uncomfortable<sup>4</sup>. Examples of this type of harassment include the sexual allusions made by male employees, the privileges male employees enjoy and which are not available for their female colleagues having a correspondent position in the organization, the display of pornographic materials and obscene objects in plain sight, engaging in telephone conversations on sexual topics, etc. (Westheimer, f.a, p. 154).

The promotion of equal opportunities and non-discrimination is one of the priorities of the Member States of the European Union and is incorporated into numerous directives issued by the EU. In 2011, the legislation governing gender equality encompassed twelve Directives, to which a series of decisions, recommendations, and opinions were added (Mocanu, 2011, p. 200).

At the European level, sexual harassment refers to a situation "where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment." This definition is to be found in the text of Directive 2002/73/EC of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and

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<sup>1</sup>Aninoșanu L., (2006), *Hărțuirea sexuală la locul de muncă*, CPE 2006, available at: [http://www.cpe.ro/managementul\\_diferentelor/ghiduri/hartuiresexuala.pdf](http://www.cpe.ro/managementul_diferentelor/ghiduri/hartuiresexuala.pdf)

<sup>2</sup>The Title VII of the Civil Rights Act of 1964

<sup>3</sup>Garrie D. B., (2011), *Sexual harassment: limiting the affirmative defense in the digital workplace*, found at web site: <http://www.juridicaljournal.univagora.ro/download/pdf/SH2011II20.pdf>

<sup>4</sup>Moldovan E., *Hărțuirea Sexuală: ce înseamnă să cauți dragostea în locuri nepotrivite*, found at web site: <http://www.dmwlawfirm.com/resources/Hartuirea%20Sexuala%20prima%20parte.pdf>

working conditions<sup>5</sup>. Sexual harassment is prohibited and is considered, for the purposes of this Directive, as an act of discrimination on grounds of gender<sup>6</sup>. Under the provisions of the same regulatory document, the rejection of such conduct by a person or the imposition of such conduct upon a person cannot constitute the grounds for any decision affecting the person concerned.

Although, as shown and determined, this is a crime difficult to prove and which generates a state of tension in the workplace, given the developments on the national level and not only, the need to criminalize sexual harassment in the Romanian legislation cannot be denied. Studies carried out in our country have revealed figures worthy of consideration. For example, the National Research on Domestic and Workplace Violence, 2003, conducted by IMAS, at the behest of Partnership for Equality Centre (Centrul Parteneriat pentru Egalitate - CPE), shows that 4.7% of the population knows someone who, in the past two years, was victim of sexual harassment; in 90% of the cases the victims were women; in 81% of the cases the victims were between sixteen and thirty years old; in 55% of the cases, the offender was the "boss" or the "manager" and in 24% of the cases, the offender was the employer.

Based on the results of the survey, three types of sexual harassment have been identified and classified according to their severity as follows: mild forms (flirtatious looks, touching, signs, use of expressions with sexual connotation) reported by 12.9% of the adult population of the country; requests for sexual relationships followed by promises ("invitations to trysts with the promise of employment or promotion," "specific request for sexual favours with the promise of a reward") reported by 1.9% of the adult population of the country; severe forms (kiss without permission, request for sexual intercourse under duress, attempted sexual intercourse by use of force) reported by 1.7% of the adult population<sup>7</sup>. The study entitled *Women and Men in Organizations*, conducted by IMAS in 2006, at the behest of Partnership for Equality Centre, presented in the cited material, also reveals that the most common methods to end acts of discrimination and sexual harassment used by employees and even recommended by managers are looking for another job and quitting.

## 2. LEGISLATIVE PRECEDENTS

Sometimes treated as a normal behaviour, sexual harassment has long been considered a taboo in our country, a "trifle" of feminists trying to draw attention to themselves.

The criminalization of sexual harassment in the Romanian legislation represents a visible progress aimed to suppress the type of behaviour which conditions employment, continuation, and promotion in a job upon obtaining sexual gratification (Gattegno, 2001, p. 98; Mateuț, 2002, p. 3; Vasiu, 2011, p. 194). At the same time, the criminalisation of

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<sup>5</sup>article 2. 2 of Directive 2002/73/EC of 23 September 2002, published in Official Journal no. L 269/2002

<sup>6</sup>Directive 2002/73/EC of 23 September 2002, (8) "Harassment related to the sex of a person and sexual harassment are contrary to the principle of equal treatment between women and men; it is therefore appropriate to define such concepts and to prohibit such forms of discrimination. To this end it must be emphasised that these forms of discrimination occur not only in the workplace, but also in the context of access to employment and vocational training, during employment and occupation".

<sup>7</sup>Aninoșanu L., (2006), *Hărțuirea sexuală la locul de muncă*, CPE 2006, available at: [http://www.cpe.ro/managementul\\_diferentelor/ghiduri/hartuiresexuala.pdf](http://www.cpe.ro/managementul_diferentelor/ghiduri/hartuiresexuala.pdf)

sexual harassment was intended to align our regulation with international standards on human rights, the requirements against gender discrimination, and the legislation of other states (Teșiu, 2012, p. 241; Predescu, Hărăstășanu, 2012, p. 162).

Sexual harassment has been criminalized for the first time in the Romanian criminal law in 2002, being brought under the category of sexual offences by Law 61/2002 endorsing Government Emergency Ordinance No. 89/20019. Thus, it was set forth in the 1969 Romanian Penal Code, Art. 203<sup>1</sup>, under the marginal designation of sexual harassment.

In drafting the provisions regarding sexual harassment of Art. 203<sup>1</sup> of the 1969 Penal Code, the Lawmaker drew upon the regulation of the French Lawmaker (Mateuț, 2002, p. 4; Godâncă-Herlea, 2006, p. 77; Dobrinoiu, Brânză, 2002, p. 24; Răducanu, 2009, p. 196).

The French legislation initially made provisions for sexual harassment in the Labour Code, Art. 123.1, para. 6 of the Act of 2 November 1992 (Rassat, 1997, p. 489; Georgescu, 2008, pp. 197-202) and, in 1994, along with the enactment of the new Penal Code, it was introduced in its content, in Art. 222-33. The initial version of Art. 222-33 of the French Code read “the fact of harassing anyone using orders, threats or constraint, in order to obtain favours of a sexual nature, by a person abusing the authority that functions confer on him” (Mayaud, 2012, p. 371-373).

Thereafter, the provisions of the French Code on sexual harassment have been modified due to the shortcomings determined in practice and highlighted in the doctrine, and the provisions of Art. 222-33 were ruled unconstitutional by reason of the overly vague definition of sexual harassment by Decision no. 4 of May 2012 of the Constitutional Council<sup>10</sup>. The definition of the offence was amended by Law No. 2012-954 of 6 August 2012 on sexual harassment, which came into force on August 8, 2012, art. 222-33 having new content<sup>11</sup>.

Under the new regulations the offence is described as follows: “the fact of imposing on a person, in a repetitive fashion, statement or behaviour of a sexual connotation which violate a person’s dignity by virtue of their degrading or humiliating character or create as concerns such person an intimidating, hostile or offensive situation”. “It is assimilated to sexual harassment the fact of using any form of serious pressure, not even repetitive, with the real or apparent goal of obtaining a sexual act regardless of whether done for the benefit of the actor of the facts or for the benefit of a third party.”

Within this context, given that the language used by our Lawmaker was of French inspiration, some of the issues raised by the French text were also “imported” into our legislation.

<sup>8</sup>Law 61/2002 published in Official Gazette. no. 65/30.01.2002

<sup>9</sup>O.U.G. nr. 89/2001 amending and supplementing certain provisions of the Penal Code, relating to offences against sexual life, published in the Official Gazette no. 338/2001.

<sup>10</sup>Décision n° 2012-240 QPC du 4 mai 2012, le Conseil constitutionnel, Journal officiel du 5 mai 2012. This decision states that the provisions of Art. 222-33 render sexual harassment a punishable offence, but the elements of this offence are not sufficiently defined and therefore it breaches the principle of legality of criminal offences and penalties. The decision is available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2012/2012-240-qpc/decision-n-2012-240-qpc-du-04-mai-2012.105618.html>.

<sup>11</sup>Loi n°2012-954 du 6 août 2012 relative au harcèlement sexuel, JORF n°0182 du 7 août 2012 page 12921, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026263463&dateTexte&categorieLien=id>.

According to the provisions mentioned above (Art. 203<sup>1</sup> of the Penal Code of 1969) "the harassment of a person, by threat or coercion, in order to obtain sexual gratification, by a person abusing the authority or influence he has or she been endowed with by their position in the workplace shall be punished by imprisonment from three months to two years or by a fine."

Subsequently, issues relating to sexual harassment have been regulated by Law 202/2002 on equal opportunities between women and men, republished in 2013<sup>12</sup>, this being the main criterion for gender discrimination. Thus, Art. 1 sets forth: "the present law regulates the measures for promoting equal opportunities between woman and men in order to eliminate all forms of gender-based discrimination, at all levels of Romania's public life." Under the provisions of Art. 37 para. 1 of this law, sexual harassment is an offence and is punishable by law.

The rejection of sexual harassment by a person or the imposition of such conduct upon a person cannot constitute the grounds for any decision affecting the person concerned (article 6, para. 4).

The provisions of Art. 4 letter d of Law 202/2002 define sexual harassment as "any undesirable sexual behaviour, expressed physically, verbally, or nonverbally, that appears for the purpose or with effect of injuring the dignity of a person and/or of creating an intimidating, hostile, degrading, humiliating or offending environment."

Prior to the express regulations on sexual harassment, and as a result of the international developments on issues related to the prohibition of discrimination and equal opportunities between women and men, our legislation included provisions on gender discrimination in Ordinance no. 137 of 31 August 2000 (republished) on Preventing and Sanctioning All Forms of Discrimination<sup>13</sup> as well as in the content of the Labour Code.

Until the adoption of the Penal Code of 1969, according to the doctrine, cases of this kind were brought before the Court based on prior complaints filed for the crime of insult (Article 205 of the Criminal Code 1969) or by means of labour disputes (Mateuț, 2002, p. 4). In time, these provisions proved unsuitable or insufficient for the successful settling of sexual harassment cases (Poenaru, 1999, p. 69; Mateuț, 2002, p. 4).

According to the provisions of Art. 203<sup>1</sup> of the Penal Code of 1969, in order for the crime to exist, the following conditions had to be met:

- the existence of harassment;
- the action of harassment should have been committed by threat or coercion;
- the harassment by threat or coercion should have been made for the purpose of obtaining sexual gratification;
- the harasser should have abused the authority or the influence that function conferred on him or her;

If the appropriateness of criminalizing sexual harassment posed no problems, bringing it under the category of sexual offences has given rise to debates about the correctness of this categorization.

It has been estimated that by regulating sexual harassment, the area of sexual touching that forms the object of existing criminal charges has extended to encompass other components likely to violate, one way or another, sexual freedom, and that its rightful

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<sup>12</sup>Republished in Official Gazette. no. 326/05.06.2013.

<sup>13</sup>Republished in Official Gazette. 99/2007.

place is among sexual offences (Mateuț, 2002, p. 3; Bogdan, 2009, p. 195; Godâncă-Herlea, 2006, p. 83).

In another opinion, after the author conducted a comparative analysis between sexual harassment and work-related offences, he concluded that, essentially, sexual harassment is a work-related offence and the reason for its being included among sexual offences had to do with the Lawmaker's concern for the protection of a person's sexual integrity (Pasere, 2002, p. 13).

At the time, this view was challenged in the literature by showing that this offence implies a form of breach of work-related duties but that, generally, the harassment of the victim occurs outside the framework of the victim's job responsibilities (Bogdan, 2009, p. 195).

If we consider the entire body of regulations regarding sexual offences meant for the protection of all the values related to the freedom and the inviolability of a person's sexual life, we can easily notice that sexual harassment belongs among these offences.

### 3. REGULATING THE OFFENCE OF SEXUAL HARASSMENT IN THE NEW PENAL CODE

The new Romanian Penal Code brings significant changes in the regulation of harassment. Thus, for the first time, we can find in the Romanian criminal law three offences, with different content, that capture aspects related to harassment, namely the offence of harassment regulated in Art. 208 of the new Penal Code, the offence of sexual harassment set forth in Art. 223 of the new Penal Code, and the offence of abuse of authority for sexual purposes regulated in Art. 299 of the new Penal Code, which applies to public servants.

The preamble of the new Code states that the crime of harassment is required for "cases which occurred in practice and in which people – mainly women – are expected and followed in the street or in public places..."<sup>14</sup>. Regarding the offence of sexual harassment, it is shown that it underwent "a new systematization, through the creation of two texts". The first text covers harassment proper, included among the offences against sexual freedom and integrity. The other text, referring to the so-called "vertical harassment" committed by means of abuse of authority, has been included in the section on work-related offences.

The solution of the Romanian Lawmaker has been criticized by showing that the artificial amplification of this matter is not justified, since neither the doctrine, nor the jurisprudence has indicated that such facts represent a problem in our country. The same author has proposed eliminating the offence of "harassment in general" (Antoniou, 2008, p. 16). However, a contrary opinion has also been expressed (Duvac, 2012, p. 76).

In a different opinion, the express criminalization of harassment was welcome, as the author has shown that "in the case of harassment, we are facing one of the most insidious conducts, which is often innocent, if not flattering, but which, in some cases, can be more than dangerous" (Nițu, 2011, p. 138). In the author's opinion, to which we subscribe, sexual harassment represents only one of the valences of harassment.

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<sup>14</sup>The statement of reasons found at web site: [www.just.ro/.../Coduri/Expunere%20motive%20-%20proiect%20-%20C...](http://www.just.ro/.../Coduri/Expunere%20motive%20-%20proiect%20-%20C...)

Under the provisions of Art. 223 of the new Penal Code, sexual harassment consists of:

“(1) repeated solicitation of sexual favours in an employment relationship or in a relationship of similar nature, by which the victim has been intimidated or put in a humiliating situation, shall be punished with imprisonment from three months to a year or with a fine.

(2) Criminal action is initiated upon prior complaint from the injured person.”

A comparative analysis of the current and the previous legal texts shows that the Lawmaker has given new content to the offence in question. The doctrine shows that, in relation to the current regulation of the offence, the new regulation can be considered new criminalization (Dobrinioiu, 2012, p. 194). One of the main changes consists of renouncing the use of the term ‘harassment’, which caused extensive debates in academic literature and which was replaced with the phrase “repeated solicitation of sexual favours.” The conditions imposed prior to 01 February 2014 have also been dropped out, namely that sexual harassment should occur by threat or coercion, in order to obtain sexual gratification. At the same time, the aspects of the code of 1969 relating to the active subject regarding the abuse of authority and the misuse of the influence conferred by the position in the workplace no longer have a correspondent in the new legal text.

From an objective perspective, the offence of sexual harassment as set forth by the new regulation consists of an action of repeated solicitation of sexual favours in an employment relationship or a relationship of similar nature, by which the victim has been intimidated or put in a humiliating situation.

For the existence of the offence, the following conditions should be met (Radu, 2012, p. 82):

- sexual solicitation should occur;
- the solicitation should occur repeatedly;
- the repeated solicitation should occur in an employment relationship or a relationship of similar nature;
- the victim should be intimidated or put in a humiliating situation

Sexual solicitation can occur verbally, nonverbally, or physically, “through direct addressing,” in writing, using other means of communication (for example, by telephone, email, internet etc.).

Sexual solicitation can consist of obscene gestures, sexual innuendo, physical touching, sending messages with sexual connotation, etc. (Dungan, Medeanu and Paşca, 2010, p. 231; Dobrinioiu, 2012, p. 197). One opinion showed that sexual solicitation involves, in fact, the moral coercion of the victim (Paraschiv, 2012, p. 60).

In the absence of express provisions on the beneficiary of sexual favours, we contend that the provisions of Art. 223 should be interpreted as meaning that sexual favours can be claimed both for the benefit of the person soliciting them, as well as for the benefit of a third party. In order to avoid uneven practice, legislative intervention would be necessary in this regard, *de lege ferenda*, and the Lawmaker should expressly specify that *the solicitation of sexual favours can be done for the benefit of the author as well as for a*

*third party*. We have also considered the similar provisions of the French Penal Code (Art. 222-33 II) and of the Spanish Penal Code<sup>15</sup>.

The text of Art. 223 of the new Penal Code is clear and unambiguous, since the Lawmaker has stated that the solicitation of sexual favours should occur repeatedly. Therefore, unless the act of soliciting sexual favours is repeated, the offence does not exist (Bogdan, Şerban and Zlati, 2014, p. 177).

The phrase “sexual favours” replaces “sexual gratification” and designates, according to some authors, “not only heterosexual or homosexual relationships, but also acts of sexual perversion or acts that do not involve personal contact (e.g. the request to undress)” (Dungan, Medeanu and Paşca, 2010, p. 231). According to another author, sexual favours may include sexual acts of any kind (Ivan, 2010, p. 226).

Given the current meaning of “sexual act of any kind” we contend that the latter view limits the scope of sexual favours that can be solicited, which could lead to discriminatory situations.

The offence of sexual harassment remains in the future regulation within the sphere of employment relationships, but the Lawmaker also criminalizes the offence of harassment in Art. 208 of the new Code, including therein the acts of harassment which occur outside the workplace. Therefore, it is necessary that both the offender and the victim be “bound” by a work related activity performed in an institution, be it public or private (Radu, 2012, p. 83).

Employment relationships may be the result of an employment contract, a temporary work agreement, or any other type of work agreements under the law. The term ‘relations similar to employment relations’ refers to a type of relationship which, although not a direct result of a written employment agreement, involves the performance of remunerated activities such as working as day labourer, housekeeping, baby-sitting, caring for elderly or sick people etc. (Dungan, Medeanu and Paşca, 2010, p. 230; Dobrinou, 2012, p. 196). According to one author, ‘relations similar to employment relations’ is a confusing and debatable term (Antoniou, 2008, p. 16).

The last condition to be met concerns the victim which has to be intimidated or put in a humiliating situation by the repeated solicitation of sexual favours. According to the doctrine, the victim is intimidated or put in a humiliating situation when the repetition of harassing acts endangers the continuation of the work relationship as well as the victim’s dignity, and jeopardizes the victim’s sexual freedom (Dungan, Medeanu and Paşca, 2010, p. 232).

In this regard, it has been shown that making the criminal liability of the author dependent on “the sometimes exaggerated subjectivity of the victim” is not justified, because it is likely to lead to abuses and controversy (Antoniou, 2008, p. 16)<sup>16</sup>. The author

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<sup>15</sup>Art. 184 para. 1 of the Spanish Penal Code provides that: “Whoever solicits favours of a sexual nature, for himself or for a third party, within the setting of a continuous or usual work relation, teaching or service provision relation, and by such conduct causes the victim a situation that is objective and seriously intimidating, hostile or humiliating, shall be convicted of sexual harassment and punished with a sentence of imprisonment of three to five months or a fine from six to ten months”.

<sup>16</sup>In the author’s opinion, some people, out of excessive sensitivity, tend to lay too much stress on facts that are generally considered minor, which would not justify criminal liability.



also shows that, in order to avoid further controversies, notions such as “intimidation” and “humiliating situations” need to be defined (Malabat, 2013, p. 178)<sup>17</sup>.

According to other authors, with whom we agree, this condition makes the text more restrictive by excluding the possibility that one’s insistence be submitted to criminal sanction without a clear procedure, thus also showing that it might have been more natural to sanction those types of conduct which intimidate the victim or put the victim in a humiliating situation. (Bogdan, Șerban and Zlati, 2014, p. 178).

In our opinion, the wording used by the Lawmaker makes it necessary to establish the existence of one or another of the consequences stipulated by the law and to determine whether they are the outcome of the offender’s repeated solicitation of sexual favours.

The subjects of sexual harassment are qualified, their specific quality deriving from the fact that the solicitation of sexual favours needs to take place in a work related situation or a similar situation (Boroi, 2011, p. 136; Dobrinou, 2012, p. 196). According to other authors, however, the subject of this offence is not considered qualified since it could be anyone, “regardless of gender and irrespective of whether that person is permanently or temporarily holding a particular position and of whether that person was hired or elected” (Dungan, Medeanu and Pașca, 2010, p. 230).

The direct offender can be anyone, regardless of the gender and irrespective of the position that person holds within work related contexts, of whether the offender is on the same level as the victim or even a subordinate (Dungan, Medeanu and Pașca, 2010, p. 230).

When sexual harassment acts are committed outside work-related or similar relationships, as long as they are committed under Art. 208 of the new Penal Code, they will be considered offences of sexual harassment, regulated by the Penal Code (Radu, 2012, p. 84).

As we have already shown, unlike the previous regulation which made it necessary for the offender to abuse the authority or the influence conferred on him or her by the position in the workplace, this condition is no longer stipulated by the new Code. Therefore, in case the offender is a public servant acting under the terms of Art. 299, para. 1 and 2 of the new Penal Code, we are in the presence of misuse of position for sexual purposes. The same is true if the offender is one of the persons described in the provisions of Art. 308 of the new Penal Code (Radu, 2012, p. 85; Bogdan, Șerban and Zlati, 2014, p. 178).

We contend that, from the point of view of criminal participation, as regulated by the law, sexual harassment cannot be committed by co-offenders. Inciting, aiding and abetting are possible, since anyone can be instigator and accomplice.

In turn, anyone can be a passive subject, regardless of gender and irrespective of the position that person holds within work related or similar relations (Radu, 2012, p. 84). As a matter of fact, the recent doctrine states that this law incriminates horizontal harassment vis-à-vis vertical harassment, criminalized by Art. 299 of the new Penal Code (Bogdan, Șerban and Zlati, 2014, p. 178; Hotca, 2009, p. 217).

As for minors, they can be the passive subject of the sexual harassment offence, provided that the victim and the author are in a work related or other similar relation.

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<sup>17</sup>Similar discussions can be encountered in the French doctrine. The questions as to whether the humiliating and degrading character should be defined by reference to the person claiming to be a victim or to an ordinary person in the same circumstances.

Considering the fact that Romanian law allows minors to engage in a working relationship at age of sixteen and, with parental consent, at fifteen years of age, we propose, *de lege ferenda*, the aggravation of the sexual harassment offence, regulated by Art. 223 of the new Penal Code, when the victim is a minor<sup>18</sup>. We can find such an aggravation in the French Penal Code, under which sexual harassment is punished more severely when the victim is a minor under the age of fifteen.

Furthermore, the French regulation considers that the offence is more serious when the passive subject is qualified, being a person in state of special vulnerability due to age, illness, infirmity, physical or mental deficiency, or a state of pregnancy, apparent or known by the offender, as well as when the act is committed on a person under special vulnerability or with dependency status due to economic or social situation, apparent or known to the offender (Malabat, 2013, p. 180).

The offense of sexual harassment as regulated in the new Criminal Code can be committed with direct intent. The offender acts knowingly, i.e. repeatedly claiming sexual favours, being aware that these acts violate the dignity of the victim by placing him or her in a humiliating or intimidating position (Malaba, 2013, p 179). The opinion according to which the act is committed with direct or indirect intention was also voiced (Dobrinioiu, 2012, p. 198).

Being a crime, it usually occurs when the acts of solicitation repeat a sufficient number of times to indicate a habitual behaviour. In the absence of clear information regarding the number of acts deemed sufficient, the penal doctrine shows that it is necessary to have at least two such acts for the offence to occur (Malabat, 2013, p. 177).

By comparing the provisions of Art. 223 and Art. 2031 of the previous Penal Code, it was noted that, beginning with 1 February 2014, the offence has a lighter punishment. Thus, under the new Code, sexual harassment is punishable by imprisonment from three months to one year or by fine.

If under the previous regulation, the prosecution was not conditional on prior complaint and could begin *ex officio*, under the new regulation, the Lawmaker decided to change the rules, thus showing consideration for the suggestions *de lege ferenda* which had been made, over time, by various authors (Pașca, 2008, p. 325; Răducanu, 2009, p. 198; Pasere, 2002, p. 21). In respect of this matter, it has recently been shown that, the introduction of the prior complaint as a prerequisite for commissioning criminal action in the case of sexual harassment is an element of normality (Bogdan, Șerban and Zlati, 2014, p. 179).

We consider that making the commission of criminal action dependent on the prior complaint of the victim is a legislative setback which contributes to the impunity of such acts. The reluctance of the victim when it comes to filing a complaint against such acts is well known, since such acts are considered most often in the Romanian society as unimportant, and therefore the intervention of the law is deemed unjustified. Moreover, we cannot help asking whether the person being harassed is really aware of the fact that he or she has become the victim of the offence in question. If under the previous regulation which did not stipulate such a condition, the number of cases brought to court was somehow small, we believe that the new provisions will lead to even smaller numbers of

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<sup>18</sup>See also the proposal made by Tanislav E. și Tanislav E. jr., based on the previous legislation, in an article published in 2003.

reported cases of sexual harassment. We join such proposal *de lege ferenda* that criminal action can be put into motion ex officio (Popescu, 2008, p. 93).

#### 4. CONCLUSIONS

The criminalization of sexual harassment represents a visible progress of our legislation, with the purpose of suppressing behaviours which contradict the principle of gender equality and aligning our regulations to international standards on human rights and to the legislation of other states.

The problems identified over time by the doctrine, but still unresolved by the Lawmaker's intervention, led to the lack of relevant practice regarding the offence of sexual harassment.

Although we consider the regulation of this offence as set forth in the new Penal Code, recently entered into force, to be superior, we cannot ignore the objectionable aspects which have already been identified in the doctrine, and whose resolution is essential in order to prevent the misapplication of the law.

Moreover, we cannot ignore the fact that the Romanian Lawmaker decided to criminalize the act only in form, while the legislation it used as a model stipulates that the crime be punished more severely if committed in specific circumstances, and we consider opportune the intervention of the Romanian Lawmaker on these lines.

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