Sexual Harrassment at Workplace: A Need for a Specific Law in Malaysia

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Abstract: In Malaysia, there has appeared no specific and comprehensive legislation deals with sexual harassment in the workplace yet. Unlike other illegal behaviors such as rape and domestic violence, sexual harassment has seemingly been regarded as a mere workplace problem and hence given less attention by lawmakers and the government. The studies in 2019 show that 60% of people from various work fields reported that they experienced and were the victims of sexual harassment within the workplace setting in Malaysia. The report also indicates that the leader at their workplace or someone superior usually committed the harassment and sometimes their colleague did such act. Indeed, sexual harassment is conduct where males play a vital role as a harasser, but it is undeniable that men are also likely to be sexually harassed. Despite the provision in the Penal Code, Employment Act 1955, and Code of Practice on the Prevention and Eradication of Sexual Harassment in the workplace, the number of cases is still on the rise. Given the extent of the problem, the objective of this paper is to examine the existing legal provision in Malaysia governing sexual harassment and the judicial approach in dealing with sexual harassment cases in Malaysia. The authors contend the need for a specific law to address the sexual harassment in Malaysia, considering the insufficiency and inefficiency of the available legislative provisions.

Keywords: Sexual Harassment, Victim, Workplace, Criminal Liability, and Employment Law

1 Introduction

Sexual harassment is generally defined as an unwanted conduct of a sexual contact which later leads to violating someone’s prestige, degrading, humiliating, or offensive environment for them (Williams, 2017). The words “them”, as used by Williams refers to both men and women who can be equally harassed. The sexual harassment often occurs within the workplace context. Historically, the word ‘harassment’, which is mostly usedis derived from American law. Friedman and Whitman (2013) define ‘harassment’ as a type of biases but such bias is defined differently in different countries. Einarsen and colleagues (2011) observe that there is no single uniform definition of what is meant by harassment or bullying at work. The lack of single accepted definition has led to many speculations as to what could amount to harassment and bullying. However, most of the researchers agree that harassment and bullying share some common features such as a wide range of negative acts that may cause psychological harm, direct and indirect behaviors which are work-related, person-related, repeated, frequent in a long duration and power imbalance-related. In Malaysia, sexual harassment is considered a workplace-related problem, but in fact, the implication of such problem goes beyond the workplace setting. Fitzgerald (2017) observes that the likelihood of committing such offence exists among men who tend to harass women in non-traditional jobs. This means that, in this twenty-first-century jobs, harassment is generally intertwined with various forms of nasty sexuality. At the core, the sexual harassment is done by men at workplaces as a mean to signal to the women that they are not welcomed and not respected at the workplaces they are attached to. Such action continues to hamper the employment opportunities, thereby impacting negatively the mental health of numerous women and certain men (Reskin & Padavic 1994). In view of the above, this paper commences with the discussion relating to the definition of sexual harassment. The second part of the paper explains the perception concerning sexual harassment in selected jurisdictions. The third part of this paper proceeds to discuss the Malaysian legal position in countering the sexual harassment problem. The next part of the paper looks at the approach of the Malaysian courts to sexual harassment cases at workplaces while the final part concludes overall discussion.

What is Sexual Harassment?

Sexual harassment is defined differently by different authors, for instance, Zhang (2017) describes it as undesirable and unwanted sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. The Equal Employment Opportunity Commission (EEOC) defines sexual harassment as unwelcome sexual advances, either verbal or physical behavior. Furthermore, EEOC defines sexual harassment in the workplace setting as a submission to such conduct which is made either explicitly or implicitly as a term or condition of an individual's employment. The behavior has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment (US
EEOC, 2009). The definition of sexual harassment is somehow too general and vague. However, the EEOC has provided the three guidelines in determining the nature of such wrongful conduct (Hovland, 1995).

In Malaysia, Section 2 of Employment Act 1955 defines sexual harassment as any unwanted sexual conduct, whether verbal, non-verbal, visual, gesture or physical, directed at a person who is abusive or humiliating or it is a threat to his or her well-being. Such risks or activities are done during employment. Gutek and Koss (1993) articulate that sexual harassment can occur in a variety of circumstances. The harasser can be connected to any gender and any relationship with the victim, including being a manager, supervisor, co-worker, peer, or colleague. Sexual harassment is conceptualized as a form of gender-based abuse that has significant effects on victims.

Most of the legal scholars argue that sexual harassment is a case of sex discrimination that happens in the employment of service context. Furthermore, Saguy (1993) contends that such action is against the equality principle, considering that the target victim for such action is often women due to their sex. In France, there are sexual violence offences which are divided into four categories, namely rape, sexual assault, exhibitionism and sexual harassment per se (Hicks, 1993). Saguy (2000) further explains that the differences between sexual assault and rape sexual harassment is that the former does involve physical contact while the latter involves the manipulation of victims' economic dependence. The equal rights advocates observe that the workplace sexual harassment could happen in many forms. Such behaviour could be done by co-workers, supervisors, customers, clients, and it usually comprises of unwanted touching, inappropriate comments or jokes or promises for a reward or promotion in return for sexual favors. There are several contributing factors for unreported sexual harassment. The first factor is the victim's fear that his or her self-respect in an organization will be jeopardized. The second factor is the threat made by the harasser using their superiority against the victim, which could result in loss of employment, loss of earning, career advancement, and other monetary gains. The victim of sexual harassment can also suffer some mental problems whereby they cry in silence, not knowing what to do, whom to tell or how to overcome such a form of harassment they are experiencing (Woods & Kavanaugh, 1994). Global literature in this area indicates that most of the country is experiencing this problem. Nonetheless, only certain countries have come out with legal measures to handle such misconduct.

**Perception regarding Sexual Harassment in Selected Jurisdictions**

In judging and perceiving certain matters, it will usually depend on the eyes of the beholder. Such a situation or occurrence solely relies on the opinion of the person who are looking at it. Such a phenomenon is due to the different views of a different perspective of people when it comes to a single person's point of view. In the same way, the sexual harassment has become one of the hot issues that people are giving their time to speak about it. Therefore, the opinion and impressions of individual countries on sexual harassment differ. Most of the developed countries such as the United States have recognized and begun to deal with the sexual harassment since the 1970s. The United States has made sexual harassment illegal through the Civil Rights Act of 1964 (Michael F. Brady, 2018). The survey conducted by the Pew Research Center indicates that the sexual harassment was viewed as a prevalent problem in society rather than as an individual misconduct. Around 66% of Americans perceived sexual harassment as an ongoing problem that deserves a public concern. Conversely, only 28% classify it as a personal misconduct (Oliphant, 2017). Additionally, Gramlich (2017) indicates that 42% of women and 14% of men had faced some forms of sexual harassment at their workplace in a three-year time. Similarly, feminism entreats us to examine multiple social positions in which people reside to address the power, privilege and oppression related to those locations regardless of biological sex. Many women who are sexually harassed primarily leave their jobs as a consequence to resulting physical and psychological challenges (Sims, Drasgow, & Fitzgerald, 2005). This reflects that the sexual harassment influences the loss of significant potentials and talents in the workforce.

Referring to the Canadian approach, they presume sexual harassment in the workplace as an 'unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment' (Lublin, 2017). Sexual harassment is a naturally unwelcome behaviour that causes the victims to feel unpleasant at their working places. The report by Canadian Woman's Association reveals that 82 percent of those populations under the age of 18 experienced sexual assault, and they are girls. Also, it is reported that 1 in 3 Canadians understand what it means to give consent in sexual situations. Nevertheless, despite rising cases of sexual harassment at the workplace, only 5% of the sexual assaults were reported to police (Canadian Woman Association, 2020). In tandem with rising cases of sexual harassment at the workplace, which is treated as serious matters, the Canadian government incorporates the provision on sexual harassment at the workplace in Division XV.1 of Part III of the Canada Labour Code. The law establishes an employee's right to employment free of sexual harassment and requires employers to take affirmative actions to prevent the sexual harassment in workplaces.
In some European countries, there is a mixed reaction as to what could amount to sexual harassment, and there are conflicting views between genders. Such contrasting views lead to disagreement and different ways of handling harassment issues. Based on the recent survey that has been conducted by YouGov in various European countries, groping a woman is an inappropriate and intolerable behavior. The survey also indicates variant responses of respondents pertaining to the man’s conduct of making a sex joke, looking at a woman’s breast and putting his arm around a woman’s waist. The Germans respond that they can tolerate to such conducts except when men put their arm around their waist. On the contrary, such behavior does not bother British women. However, they feel that it is most improper if a man keeps on staring at their breasts. Moreover, Finland had a mind that sex joke does not sound unsuitable and does not create an unpleasant feeling in the work environment (Vera Kern, 2017).

**Laws Governing Sexual Harassment**

The law governing sexual harassment can be traced back from international law. The first international law that governs sexual harassment is General Assembly Resolution 48/104 on the Deliration of Violence Against Women in 1993. This international law defines sexual harassment as to include the act of violence against women which is prohibited at work, educational institutions or elsewhere. The law also commits the countries to develop penal, civil and other administrative measures to eliminate any violence against women (Mallow, 2013).

Furthermore, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) is another piece of international legislation that obliges the state parties to undertake approaches in minimizing the discrimination against women in workplaces (Elson, 2006). Next, the International Labor Organization prohibits the act of sexual harassment at workplaces via the Discrimination Convention 111 of 1958 (ILO, 2000).

Following the international legislation, few countries in the world have enacted a specific law to curb and deal with the problem of sexual harassment. For instance, Singapore has promulgated the Protection of Harassment Act 2014. The main aim of this legal tool is to protect the victim of sexual harassment and illegal stalking and to provide civil remedies related to false statements of fact (Levar, 2017). The Act covers harassment in online forms which include online sexual harassment and cyber-bullying. Moreover, such law provides the court with a broad sentencing options, with some offenses are punishable with imprisonment terms where appropriate, instead of mere fines under the Miscellaneous Offences (Public Order and Nuisance) Act (Chin, 2014).

In India, there is the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redress) Act, 2013 enacted for protecting every woman who has been sexually harassed at her workplace. The workplace can be any organization; a government or a private organization. It is not necessary for a woman to be working at the workplace in which she is harassed. (Aditya Shrivastava, 2018).

In the United Kingdom, there is the Protection from Harassment Act 1997 to protect victims of sexual harassment. In addition to this law, they also have the Equality Act 2010 which provides that a person can be punished if he involves in unwanted conducts that might violate and degrade another person’s dignity.

The sexual harassment is also prohibited in the United States. The #MeToo movement’s campaign has gone global, encouraging women in 85 countries to share problems of sexual harassment with women from France, Italy, and nations across Latin America and the Middle East launched their hash-tags. However, it is important to note that women and men around the world need more than just a social media campaign to overcome the outbreak of sexual harassment at the workplace. They need legal provisions that prohibit discrimination and sexual assault in the job, with this, they will be brave to lodge a report against the harasser (AnimahKosai, 2017).

**The Malaysian Law on Sexual Harassment**

In Malaysia, there is no specific law governing sexual harassment conduct. However, despite the absence of a specific legislation to regulate such behavior, there are some applicable acts and code including the Penal Code (Act 574), Employment Act 1955 and the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace. The most relevant provision the Malaysian Penal Code relating to sexual harassment is Section 509. It states that it is an offense if any person utters any words, makes sound or gesture or displays any object which intention to insult the modesty of any person. Upon conviction, such offender is liable to imprisonment for maximum five years or fine or both. Rahim (2000) observes that the main objective of Section 509 is to protect the modesty and chastity of a woman. Furthermore, such action could be done either by uttering any words, making any sound or gesture, or exhibiting any object to a woman in view to intrude her
privacy. As an illustration, a person who blackmailed a woman by threatening to send her nude pictures could be charged under this act. Another relevant provision of the Penal Code is Section 354 which specifies the criminal offense of assaults or uses criminal force to any person with intention to outrage or knowledge that it to be likely that he will thereby outrage the modesty of that person. The punishment for such offence is imprisonment for up to ten years or fine or whipping or any two of such sentences. The main aim of the legislator is to protect and preserve the interest of any person from indecent assault and to safeguard public morality and decent behavior (Rahim, 2000).

With respect to the Employment Act 1955, Section 2 defines sexual harassment at workplace as “unwanted conduct of a sexual nature, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his well-being, arising out of and in the course of his employment.” The provision explicitly refers sexual harassment as a sexual conduct which is not desired by a person and can come in different ways including through words, body movements and physical reaction that lead the victim to an unpleasant situation (Herek, Cogan, & Gillis, 2002). Be that as it may, it is a fundamental obligation for employers to investigate any complaints that he or she received regarding sexual harassment as featured in Section 81F of Employment Act 1955. The employer must lead an investigation into complaints of sexual harassment. The significant exceptions are where the complaint was already asked into and no sexual harassment issue has been proven or where there employer regards that the complaint is not essential, vexatious or made in mala fide. If an employee is unsatisfied with the refusal of the employer to investigate, he or she may refer the issue to the General Director of Labor. The failure of the employer to give consent to this Section will add up to an offense that is liable to a fine of up to Malaysian Ringgit (MYR) ten thousand (Buang, 2017). Furthermore, the employees who quit their jobs for the reason they have been sexually harassed, they can make a complaint at the Industrial Relations Department against their employer based on the constructive dismissal under Section 20 of the Industrial Relations Act 1967. The burden of demonstrating the sexual harassment case to the Industrial Court relies on the plaintiff. (Hassan, & Lee, 2015).

Moreover, the Code of Practice on the Prevention and Eradication of Sexual Harassment (Code of Practice) was introduced by the Malaysian Human Resources Ministry (MOHR) in 1999. The main aim objective of the Code is to provide guidelines to employers on the establishment of internal mechanisms to prevent and address the sexual harassment in workplaces within the private sector context. Most of employers should play a vital role to prevent sexual harassment issue that happens in workplaces. Nonetheless, despite of the introduction of the Code, it does not have the force of law (Buang, 2017). According to the Malaysian Employers Federation (MEF), as of August 2010, only 400 of 450,000 registered and active companies have adopted and implemented the Code. Based on the Code, the sexual harassment can be classified into two classes. First, sexual coercion is the point at which somebody takes advantage of their position's power to gain sexual favors. Second, sexual annoyance is the point at which somebody acts in sexually suggestive approaches to influence the unwelcoming work spaces. The Code of Practice is merely a guideline and hence the employer is not obliged to implement it (Ismail, Chee, & Bee, 2007).

In addition, many of the victims do not speak up and are not mentally and physically ready to lodge a report against the harassers. Today, most of the Malaysian women begin to buck up when other women across the globe voice out and share their experience as sexual harassment victims. Surprisingly, they have found a voice in many civil society groups that speak up for a specific sexual harassment law to be enacted to secure Malaysians (Azizan, 2017). The President of the Association of Women Lawyers (AWL), Tham Hui Ying asserts that the sexual harassment issue has not been treated as a severe issue. She also mentions that it is almost 20 years since the Code of Practice has been introduced and there have been no improvements to the problems. This is given that many organizations have not practised the Code. The government, at the same time, could not compel the companies to adopt and enforce it. For this reason, the government should take immediate action by enacting a specific sexual harassment act so that the issue can be adequately addressed, everyone will be free from sexual harassment and a healthy working environment can be achieved (Ying, 2012).

In supporting to Tham Hui Ting, the communication officer of Women’s Aid Organization, Tan Heang- Lee agree that there is a big gap in the Malaysian legal structure when it comes to sexual harassment. He highlighted that based on the existing employment law in Malaysia, it is upon an employer to investigate or not any complaints regarding sexual harassment, which means that an employer has the option to deal with the cases. Further, the Malaysian Ministry of Women, Family, and Community Development sees that the available law is currently inadequate to solve the sexual harassment problem. The Ministry shares that they recently had consultations sessions with Non-Government Organizations (NGOs) to discuss the urgency to enact sexual harassment act. (Serrano, 2013). Similarly, Communications officer of Sisters in Islam (SIS), Alia Affendyemphasized the need to impose liabilities upon the harassers and to ensure that victims have access to legal assistance. Hannah Kam, who is the co-founder of the Organization for National Empowerment (ONE), has
a similar point of view to support for the promulgation of a specific sexual harassment Act. She has an opinion that an organized legal framework is essential to secure our society from any sexual harassment (Victoria Brown, 2018).

It is evident that there emerges a need for a sexual harassment Act in Malaysia. However, the specific law alone is insufficient to address the problem. The enforcement and forum for complaints regarding sexual harassment incidents should be established in which the victims can lodge a report without fear and embarrassment. There have been some victims who are not ready to express their real anger owing to their anxiety about the potential consequences (Woodzicka & LaFrance, 2001).

Additionally, the Me Too Movement is a movement against sexual harassment, and it is an excellent example of how to encourage the victim to express their concern on the issues. Such a campaign is proven to be a success when it has spread in recent times as a hashtag used on social media in an attempt to show the widespread prevalence of sexual harassment, mainly in the workplace. This movement becomes an eye-opener for many in numerous countries including Malaysia. It has undoubtedly been an excellent platform for the victims to speak up about their experience of being sexually harassed or assaulted (Khomami, 2017).

**The Judicial Approach on Sexual Harassment Cases in Malaysia**

In Malaysia from the period of 2013 to 2018 a total of 1,218 sexual harassment cases were reported. The statistics indicates that 79% involved victims who were women. In the case of Khoo Ee Peng v. Galaxy Automation SdnBhd - Award No.: 656 of 2009, the plaintiff was constructively dismissed by the respondent who was a branch manager in the organization after she disagreed for his sexual advances. The organization dismissed the plaintiff because she went on leave without filling in a leave application form. Again, she claimed that the manager in various circumstances had harassed her. With the fear of losing her self-respect and income for her family, she did not make a police report over the past occurrences. After the incident, her petrol allowance was pulled back even though she was not downgraded, and she was assigned work she would not like to do. In the wake of thinking about the entire sequence of the case, the Court decided that the plaintiff had effectively proved she had been dismissed under constructive dismissal, and she did not willfully quit from her job.

Next, similarly, in the case of Ahmad Ibrahim Dato Seri MohdGhazau v. August land Hotel SdnBhd Award No.: 1460 of 2010. The fact is that the plaintiff was terminated from employment because of his sexual harassment acts towards a female clerk by groping her lips and smacking her backside without her consent. There was no further complaint was made and no essential proof of the allegation. The court rejected to set up on the balance of probabilities that the plaintiff's dismissal from job was with a valid reason and contended that a charge of sexual harassment brings upon the once blamed the potential prospect for gigantic yet undeserved humiliation and significant harms to the accused’s professional standing as well as to his social and individual reputations also, if perchance the claim is grounded upon duplicitous allegations. Therefore, the Industrial Court granted the plaintiff compensation in lieu of reinstatement and back-dated wages.

In addition, the case of Mohd Nasir Deraman v SistemTelevisyen Malaysia Berhad (TV3) - Award No.: 480 of 2010. The plaintiff was an executive broadcast journalist for TV3. He was blamed for sexually harassing a practical trainee of the organization. The victim asserted that the plaintiff had laid his head on her lap while traveling to Port Dickson to conduct a program. Additionally, he made sucking sounds while looking at her breasts and asked her as to whether he could nibble them. The plaintiff conceded that he laid his head on the lap of the victim with the victim’s consent. He likewise submitted the argument that the sucking sound was from the little gap in the middle of his front teeth and that he did not make such sounds with any sinister motive towards the victim. As to the expression of the words “biting of breasts,” he said that it was merely a common joke. The Court held that the victim’s story was more dependable and corroborated by independent evidence. By contrariness, the plaintiff’s defense was an open refusal of the wrongdoing and an explicit lie and not satisfactory by any means (Halili Hassan & Zing Lee, 2015).

The courts’ decisions somehow mirror that the sexual harassment victims can only get the wrongdoers penalized but they did not get any compensation. The latest legal development in Malaysia entails the victims with chances to seek remedy. This can be seen in the case of MohdRidzwan bin Abdul Razak v Asmah Binti Hj/MohdNor [2016] 4 MLJ 282. In this case, Asmah filed a complaint against Ridzwan because he expressed a few indecent and harassing words towards her in the workplace. For this reason, a committee was established to examine the issue. The committee found that the evidence was not enough to take a disciplinary proceeding, but a solid, authoritative remand was given to Ridzwan, which resulted into the non-renewal of his employment 458.
contract. Ridzwan then sued Asmah for defamation, and Asmah counter sued. In the Federal Court, Asmah was granted with Malaysian Ringgit (MYR) one hundred thousand as general damages and Malaysian Ringgit (MYR) twenty thousand as exemplary damages (Amsharaziz, 2017). The judges in the cases highlighted that sexual harassment is a severe offense that could lower the dignity and respect of the victims, which would affect them mentally and emotionally. Also, they emphasized that if no action were taken against the harassers, the victims would face intimidation, humiliation, and trauma and the working environment appears unhealthy.

On the other hand, the case of *Malaysia Airline System Berhad v Wan Sa’adi Wan Mustafa* [2015] 1 AMR 629, in this case, the defendant was dismissed from the company because he sexually harassed his co-workers while working together. The defendant, who was not satisfied with the decision of the company to terminate him, argued that the dismissal was not in accordance with the principle of natural justice in which the court has allowed the victim to give her testimony in video. The decision by the Federal Court was made based on particular facts, and it should not be taken as a blanket authority that “in camera” testimony will be always considered procedural fair. It is possible for the decision to come out differently if the respondent’s counsel was not allowed to be present during the in-camera testimony, or if the in-camera statement was conducted for another subject matter that is not as “sensitive” as sexual harassment complaint.

The judicial approach of granting damages to sexual harassment victims means the recognition and incorporation of law of tort to the sexual harassment cases. Other than allowing the sexual harassment victims to claim compensation, the verdict of the case serves as a landmark because it has evolved on how offenders and victims should be managed. Also, this landmark verdict represents an invited evolve and a step towards the formation of a more secure work environment for Malaysian workers (Foo Siew Li, 2018). As sexual harassment has been acknowledged as a tort by the Federal Court, and the employers should be further encouraged to treat claims of sexual harassment seriously.

2. Conclusion

To sum up, multiple countries have their own pieces of legislation to address the sexual harassment. Similarly, Malaysia has legislative provisions, particularly the criminal law in term of Penal Code and employment law that relate to the misconduct. However, despite the available laws, they seem to be insufficient as sexual harassment problem require wider basis and scope of enforcement and public awareness. It can be summed up that sexual harassment does not differentiate between white or blue-collar employment; it happened in all organizations. Despite the existent legislation relating to sexual harassment, there remain many issues. The Malaysian Penal Code which is the main Criminal Law tool has limited coverage of sexual harassment cases. It focuses on punishing the offenders rather than specifying related mechanisms of controlling by the employers and remedies of victims. Also, the general provisions of Employment Law in Malaysia including regarding constructive dismissal that are applicable for sexual harassment is conditional upon the recognition and application of the courts. Further, the said provisions do not cover the aspects of investigation, complaints, the offender’s concrete liability and the remedies upon the victims.

Additionally, in spite of the introduction of the Code of Practice on the Prevention and Eradication of Sexual Harassment (Code of Practice) in 1999, the Code has no any legal effect. As have been highlighted, there also persist numerous issues which arguably can not be addressed by the existing laws in Malaysia. With the increasing numbers of reported cases of sexual harassment up to 300 cases in 2018, the government must introduce a specific law on sexual harassment. The proposed legislation is necessary to address the workforce on their awareness and the proper procedure in exercising their rights of complaining in case of any sexual harassment. With the creation of a specific Act on sexual harassment, it is hoped that every employee, regardless of gender, position, age, and salary, will be reasonably protected and sexual harassment at the workplace cases will reduce. It is further hoped that the employers become the catalyst for enhancing awareness among their employees about the legal rights and remedies available to them in the cases of sexual harassment.

References


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