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# Criminal Liability Against Sexual Harasser at The Malaysian Workplace

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## Abstract

This study is a legal analysis of criminal liability against sexual harasser in the Malaysian workplace. Malaysia faces this sexual harassment issue where the environments for this violence occur, like educational institutions and the public and non-public sectors. Firstly, the problems that surfaced were that the number of reported sexual harassment cases increased gradually. Secondly, there is no specific legislation in Malaysia to govern workplace sexual harassment. The victim only has a limited platform to report or take action against the harasser, namely under the Malaysian Penal Code and Employment Act 1955. Thirdly, the current complaint and redress mechanism does not spell out how exactly the perpetrators of sexual harassment will be punished under criminal law. This study examined the available criminal liability under Malaysian and Indian legislation. It determined the effectiveness of the current law to curb sexual harassment in both countries. Sexual harassment-related statutes and reported cases were highlighted and analyzed. All relevant legislation, subsidiary legislation, code of practice regulations, and guidelines have endured comprehensive scrutiny. Various organizations' findings were examined, and appropriate results were outlined. It was found that the current Malaysian legal protection on criminal liability is insufficient to curtail workplace sexual harassment as compared to the Indian legal mechanism. It has been recommended that the Malaysian government implements various types of reforms to curb sexual harassment in the workplace. Such recommendations include enacting a new all-inclusive sexual harassment bill. It is the best solution to sexual harassment and amending the Malaysian Penal Code to include new provisions that primarily deal with the offense of sexual harassment.

*Keywords: Sexual Harassment; Workplace; Legal Protection; Criminal Liability; Sexual Harasser*

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## I. INTRODUCTION

Malaysia is a country in Southeast Asia that hired most workers from either local or international. It is trite law that an employer must secure and provide conducive working conditions for their employees without any limitation. One way is to argue that an employer owes his workers a contractual obligation to have a secure and conducive working atmosphere [1]. A 'secure and conducive' work atmosphere is when the workers are not exposed to sexual harassment. Sexual harassment is generally accepted as an act of unwanted and unwelcome sexual conduct that may destroy one's working environment [2]. Developing countries like Malaysia face this sexual harassment issue where this violence occurs, in educational institutions and public and private sectors. In 2018, Malaysia had 'shocked' by the case of an expert doctor from a public hospital in the Klang Valley who was sacked for sexual harassment towards his female housemen on several occasions ("Specialist case"). Former

Health Minister Dzulkefly Ahmad brought this Specialist case to Yang di-Pertuan Agong's attention, who was considering firing this doctor [3]. Sexual harassment crosses status, social classification, age, education, occupation, and authority lines. A man or woman may be the perpetrator. There are so many ways sexual assault can happen, such as men by men, women by women, women by men, and men by women. The complex and multidimensional nature of sexual harassment produces a hostile environment where sexually motivated behaviour predominates. Many people feel it, especially at work [4]. Currently, there is no clear law in Malaysia, covering workplace sexual harassment [5]. References can be made to various statutes and non-legal binding circulars and codes of practice.

As a result, this issue became the primary preference for this research and provided a study about criminal liability against sexual harasser in the Malaysian workplace and a comparative study with

Indian law. This study helps clarify the specific problems regarding criminal liability for workplace sexual harassment, and this study will encourage future enhancement regarding legal protection against workplace sexual harassment in Malaysia, especially criminal liability.

## II. LITERATURE VIEW

What is sexual harassment in the workplace? According to Muzaffar Syah Mallow, it is challenging to find the real meaning of workplace sexual harassment [6]. Until today, there is a single appropriate accord on the concept of workplace sexual harassment. Meanwhile, Ahmad Shamsul Abd Aziz highlighted that based on various discussions and references from many jurisdictions, including in Malaysia, sexual harassment at the workplace could be understood and defined as any sexual comment or act committed unwanted or unwelcome by the perpetrator to the victim and taking place at the workplace [7]. According to Gouri and Norazlina, any type of sexual innuendo, whether by phrases, actions, behaviors, or looks, may be perceived as sexual harassment if the victim believes the unwanted exposure is connected to his or her job [8]. The word "sexual harassment" refers to sexual behaviour that is upsetting and humiliating and is perceived as stimulating by the recipient [9]. This type of workplace violence includes any aggressive actions and sexually explicit statements made by a stalker that are designed to intimidate a victim by undermining their dignity, self-worth, or physical and mental integrity [10].

Besides that, Muzaffar Syah B Mallow contended that sexual harassment may occur in places associated with employment in addition to the workplace, such as conventions and recruitment centers, restaurants for work lunches, resorts for work vacations, or social gatherings [11]. There are two types of harassment namely; the employees were given a career opportunity, better work duties, or a salary in exchange for sexual favors and vice versa in a quid pro quo arrangement and an unfavorable employment climate in which workers fear that they will lose their employment if they stay at a particular business or workplace [12]. According to Mcewen et al (2021), due to the perpetrator's higher organisational position and unbalanced power relationships, sexual violence against women in the workplace continues to be prevalent and rarely addressed [13].

## III. RESEARCH METHODOLOGY

The study is based on theoretical research which focuses on a doctrinal approach, i.e., library-based analysis. This study's scope concentrated on the legal analysis of sexual harassment in the Malaysian workplace, and the main emphasis is based on criminal liability under the Malaysian Penal Code. This analysis also covered legal protection under the Employment Act 1955.

The Analytical Method is used since the study is purely on analyzing criminal liability against sexual harassers in Malaysia. This type of study's primary purpose is to identify, explain, investigate, interpret, and present evidence, rules, provisions, definitions, hypotheses, or the function of particular laws or legal entities in a comprehensive manner. The study is based on the two methods in the collection of primary and secondary data. Firstly, by using the Library method to include sexual harassment-related laws/regulations and select cases. In addition, various data is collected from reference books, articles, legal reviews, and data from the websites of the Ministry of Human Resources of Malaysia, Attorney General's Chambers of Malaysia, Enforcement Agencies as well as the Legal Courts of Malaysia. This study's nature required analysis of legal provisions, code of practice, case studies, guidelines, and regulations. Hence, the analytical method was the most suitable method of analyzing the data collected because it revolves around determining the legal mechanism available to the victims due to sexual harassment in the Malaysian workplace, especially on matters related to criminal liability.

## IV. RESULT AND DISCUSSION

In the study, there was no specific legislation in Malaysia dealing with sexual harassment in the workplace. However, the issue relating to sexual harassment in the workplace has been considered under various statutes, for example, some provisions under the Malaysian Penal Code, and Employment Act 1955 [14]. The Employment Act 1955 is Malaysia's primary employment legislation, which guides minimum employment rules under which companies can function. Section 14(3) of the Employment Act 1955 was the only section that the victim of sexual harassment in the workplace could anticipate under this act before the amendment. Section 14(3) states that an employee's contract of service with his employer may be terminated without notice if he or his dependents are automatically affected by abuse or illness that the employee did not want to run under his contract of service.

Section 81A of the Act is intended to cover any accusation of sexual harassment in the workplace, which includes complaints made; (i) by an employee against another employee, (ii) by an employee against another employer, or (iii) by an employer against an employee. It clearly shows that a complaint can be made either by an employee or an employer. The act makes it mandatory for all employers to inquire into any sexual harassment complaint received. An employer is required by Section 81B of the Act to investigate any accusation of sexual harassment in the workplace. If the employer refuses, the employee must be notified of the grounds for the refusal, and the matter must be referred to the aggrieved employee's Director-General of Labour. Besides that, when a person is found guilty of a crime, they can be fired without warning, demoted, or disciplined with a reduced sentence, such as a two-week suspension without pay.

Currently, the Malaysian Court regarded the act of sexual harassment as a severe offense and misconduct that may merit dismissal by the company. This principle is well explained in *Joubert Erick v. Sakura Ferroalloys Sdn Bhd* [2021] 1 ILR 49, whereby the claimant, an expatriate of South African nationality, has been allegedly sexually harassed by another employee. An investigation had been conducted, and the claimant had reportedly admitted to the sexual harassment complaint and apologized to the victim. A show-cause letter was given to him, and he was ultimately dismissed from service on the grounds of serious misconduct. The complainant now argues that, without just cause and justification, his dismissal was carried out. This case indicates that the company must inquire into the complaints of sexual harassment, conduct domestic inquiry and take an unbiased decision based on the pieces of evidence submitted by both parties to the complaint. However, there are several limits to the act. The current definition of sexual harassment, for instance, only applies to sexual annoyance. Sexual coercion is not included, as to whether cyber-sexual harassment is covered and whether harassment is covered after working hours or outside the workplace.

Apart from Employment Act 1955, workplace sexual harassment is usually scrutinized under four main sections of the Malaysian Penal Code, such as Section 354, which provides for assault or use of criminal force on an individual with the intent to outrage modesty, Section 355, which provides for assault or criminal force to dishonor a person, other than a severe provocation.; Section 375, which provides for rape; and Section 509, which includes words or gestures intended to insult women's modesty. It should be highlighted that the victim's modesty as a woman is not only determined

by harassment of a particular part of the body but is also based on the intention and act of an offender. Furthermore, section 354 of the Penal Code states whoever assaults or uses criminal force against any person with the intent or knowledge that he will thereby outrage that person's modesty shall be punished with incarceration for a period of up to ten years, a fine, or whipping, or any two of these penalties.

Sexual harassment is an act of physical conduct, and it is undeniable that certain types of sexual harassment may be treated as criminal offenses under the Penal Code, such as physical violence, sexual misconduct, and rape [15]. This principle is well explained in the case of *Hall and others v. A & A Sheiban Pty Ltd and Others* [1989] 85 ALR 503, whereby Justice French said that the term "sexual harassment" encompasses illegal behavior, and such behavior may be often associated with it [16].

An individual who assaults or uses criminal force against any person, with the intention or knowledge that the modesty of the person is outraged, commits an offense, and, if found guilty, will be punishable following the above section. In *PP v. Kamarul Azamin Mohamad & Another Appeal* [2021] 2 CLJ 386, the court held that the ingredients of the crime referred to in Section 354 of the Penal Code are: (i) the attack or use of criminal force against a person must have occurred, and (ii) the assault or use of criminal force must have happened (a) to outrage modesty; or (b) in the knowledge that the modesty of the person is likely to be outraged.

Even though the Malaysian Penal Code provides the most significant punishment for impeaching sexual harassment in the workplace, but still many disadvantages cause interruption to relying solely on this form of rule. They deal with the most extreme sexual abuse and physical aggression and do not handle sexual harassment-related work sufficiently. Indeed, it can be difficult to prove sexual harassment in workplace claims, considering that it sometimes happens without witnesses. Any worker who wishes to sue in the workplace for sexual harassment must look at the available facts to make their case. The stronger the proof, the stronger the argument, and the stronger the remedial options are. In a nutshell, the criminal liability for sexual harassment in the Malaysian workplace may significantly deter the working fraternity who encounter sexual harassment in the workplace.

## V. CONCLUSION

After analyzing all relevant provisions under the Malaysian Penal Code, the study concludes that only the most extreme types of sexual abuse and physical aggression are covered under the Penal Code. The study also indicates that the current provisions do not handle sexual harassment-related work sufficiently. Compared with other jurisdictions, such as Indian Penal Code, the legal protection is far better than in Malaysia as the former has developed the law on sexual harassment and identified the loopholes in the previous law [17].

The current legislation has loopholes, and a new sexual harassment act is the only way to fix the epidemic of sexual harassment in classrooms, offices, and public spaces. This new act is necessary because many sexual harassment incidents go unreported, and the victim is unsure if the activity was sexual harassment and, if so, where to file a complaint and what to do [18]. The Anti-Sexual Harassment bill was passed by the Lower House of Parliament (*Dewan Rakyat*) in December 2021 in the First Reading and in July 2022 in the Second Reading, following the emergence of the #MeToo movement in 2018 and more than two decades of advocacy and lobbying by women's rights activists, civil society, government officials, and politicians alike [19]. The Sexual Harassment Act 2022 ('the Act') was just enacted into law on October 8, 2022, and it was made public on October 18. The Act has not yet entered into force.

Furthermore, there is a need to amend the Malaysian Penal Code to protect the victim and punish the offenders. The study recommends several amendments that need to be included in the Malaysian Penal Code such as including an offense of stalking in the Penal Code, an offense of sexual harassment, and increase fines and sanctions to the offender.

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