

Sexual Harassment: How Far Does the Penal Code Protect the Victim?

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ABSTRACT

Sexual harassment comes in various forms such as offensive remarks or jokes, showing off pornographic materials, sex-based letters etc. These series of act are not only evident against women, but sometimes it is prejudiced against men as well. More recently, attention has been given to this serious problem of sexual harassment, either in a workplace or even in other places. The question here is, do we have a specific legislation or law to address the problem of sexual harassment and to buttress the commission of this particular offence? This article is aimed at highlighting the relevant provisions of law relating to sexual harassment and discussing the problems that arise in enforcing the law. Lastly in this article it may also be useful to consider the effectiveness of the existing law in protecting the victims and the public at large. This is significant to be noted because law is the only instrument through which crimes can be prevented; provided the law enforcement machinery implements the provisions of law efficiently.

INTRODUCTION.

Sexual harassment is considered as an uncivilised and indecent act and it is against good norms and values. Though the degree of the offence is not as serious as a rape offence, it is a serious sexual abuse to the victim. Currently, more steps are taken by most of the countries to prevent the problem of sexual harassment efficiently. Most of the countries, for example United Kingdom, United States and India have a clear provision for sexual harassment, because this type of problem is categorised under acts of violence against person, especially, against women.

Sexual harassment is not a new phenomenon in our society. There are few relevant provisions in the Penal Code providing the offence and the punishment. Nevertheless, the problem the society is facing is the reluctance of the victim or the public to reveal the truth and bring it to the front line. They would prefer to keep the experience as their own dark secret, rather to come forward disclosing the truth.

The purpose of this article is to establish what is defined as sexual harassment and to discuss some relevant provisions in the Penal Code in addressing the problem of sexual harassment. The Code Of Practice On The Prevention and

Eradication Of Sexual Harassment In The Workplace 1999 (The Code 1999) will also be highlighted in order to see the possible solutions in preventing sexual harassment.

DEFINITION OF SEXUAL HARASSMENT.

There is no specific or exact definition for sexual harassment. Basically, sexual harassment means an annoyance to a person which is done sexually, either through conduct or words, against the victim's will. According to L.B.Curzon,¹ sexual harassment means causing annoyance to female employees at their place of work by pestering or taunting them in a manner involving unwelcome physical, verbal and non-verbal conduct of a sexual nature.

The definition given by L.B.Curzon is not a conclusive definition of sexual harassment because it only covers sexual harassment in a workplace, done specifically to women employees. In a broad sense, sexual harassment also covers a wide range of places including at a bus stop, a market, a shopping complex etc, and it can also happen to a man as well. Thus, the definition by L.B.Curzon is not a comprehensive definition, perhaps it will only apply to the scope of The Code 1999.

Sexual harassment may also refer to the unwanted, unreasonable and offensive conduct or words to the recipient. This includes unwelcome sexual advances, requests for sexual favors or any act that the harasser knows would outrage the modesty of a person, and affect the dignity of any person. A range of behaviour may be considered to constitute sexual harassment for examples, licking lips, touching, fondling, caressing, rubbing against another person, patting, hugging, kissing, degrading comments on size, figure, body shape, weight etc. It is submitted that the important features of sexual harassment are; the behaviour that constitutes sexual harassment, the fact that it is unwanted by the recipient, the sexual dimension to the incidents, the power the harasser exerts, which may be more than sexual in nature and finally the loss experienced by the victim and women in general.²

Based on few definitions above, it is no doubt that sexual harassment refers to series of sexual act that are unwanted or unwelcome by the victims. There is no abstract standard can be laid down in giving the definition of sexual harassment. What is sexual harassment depends upon the customs, manners, way of life or traditional values of the victims. Meaning to say, the cultural, social and emotional background of the society to which the victims belong, may help us to define what constitutes sexual harassment.

RELEVANT PROVISIONS OF SEXUAL HARASSMENT IN THE PENAL CODE OF MALAYSIA

Section 509 of the Penal Code

The section provides :

Word or gesture intended to insult the modesty of a woman.

Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gestures or object shall be seen by such woman, or intrudes upon the privacy of such woman, shall be punished with imprisonment for a term which may extend to five years or with fine, or with both.

The object of this section is to protect the modesty and chastity of a woman.³ Among the essential requirements that need to be proved are intention to insult the modesty of a woman. The insult is either by uttering any word, or making any sound or gesture, or exhibiting any object; so as to be heard or seen by such woman, or intruding upon the privacy of such woman.

Thus, from this provision, the victim must be a woman, not a man. The question of what constitutes an insult to a woman's modesty is a question of fact, depending on the circumstances of the case. In this context, the essential characteristic of sexual harassment is that it is unwanted by the woman, that it is for each individual to determine what behaviour is acceptable to her and what she regards as offensive.

Pertaining to section 509, there are only few cases that have been reported. The section requires proof of corroborative evidence, which sometimes very difficult to establish. Corroboration is confirmation of the evidence as to a particular fact by other evidence of the same fact or connected fact⁴. It is not easy to prove that a woman's modesty has been insulted, especially when the definition of modesty itself is not being defined by the Penal Code. When a matter is considered as a question of fact, it is left to the discretion of the judge to decide based on the contention by the counsels. That is why corroboration is a must in such situation to support the truth of the complaint.

Section 354 of The Penal Code

Below is the provision of section 354:

Assault or use of criminal force to a person with intent to outrage modesty.

Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to ten years, or with fine, or with whipping, or with any two of such punishments.

It is understood that this section is enacted with a view to protect and preserve the interest of any person from indecent assault as well as to safeguard public morality and decent behaviour. Section 354 can be used to solve the problem of sexual harassment, provided that the element of assault⁵ or criminal force⁶ is established, together with the intention to outrage someone's modesty.

Since the word 'modesty' has not been defined by the Penal Code, the definition of it may vary according to the facts in each case and there is no abstract conception of modesty that can apply to all cases. 'Modesty' will also depend upon the moral, social, background, race, or tradition of the victim, thus these factors will determine whether the assault or criminal force that has been used by the harasser constitute outraging modesty or otherwise.

In the case of *PP v Mardai*⁷, the accused who lived in the next room to the complainant, an unmarried woman, climbed over the partition between their rooms during the night and having embraced the complainant, threatened to stab her when she started shouting. The accused who was charged with section 354, was acquitted for three main factors namely; the victim failed to recognise the accused precisely in her first statement after the incident, failure to call two of victim's brothers and disputed or unreconcile evidence about the light of lamp in the victim's room

The court in this case held that the evidence of the complainant must be corroborated. It will be unsafe to convict the accused unless either the evidence of the complainant is unusually convincing, or there is some corroboration of the complainant's story.⁸

The need of corroboration is no doubt in proving section 354. The case of *Dabal Bin Anding @ Dabal Dharu v PP*⁹ also emphasises on the importance of corroborative evidence. This is an appeal case for the accused's conviction of criminal force done by him to his 8 years old female student, with an intention to outrage her modesty by virtue of section 354 of the Penal Code. The accused was a teacher at Sekolah Rendah Tanjong Batu Darat, Tawau, Sabah. From the evidence, the victim testified that the accused asked her to remain in the classroom while the rest of her classmates were sent away to the field for their physical education. When the accused and the victim were alone, the accused locked the door of the classroom, lifted the child onto a teacher's table and laid the child on it. The accused removed the panty of the victim and unzipped his trousers. He then took out his private part, laid on top of the child and brushed his private part against the private part of the child. The accused then ejaculated the sperm to the side of the private part of the victim. This incident happened five times and from the medical report, the doctor testified that the hymen of the child showed abrasions which were possibly caused by the rubbing together of two sexual organs.

It was held in this case that the conviction could not stand. The charge did not specify the exact location in the school where the offence was alleged to have been committed. The judge in this case quashed the conviction and sentence based on several reasons, and one of them is concerning the child evidence. The provisions governing the evidence of the child are section 118 and section 133A¹⁰ of the Evidence Act 1950 and in Sabah, these have to be read with the Oath Ordinance (Cap. 89) of Sabah. Under section 133A of the Evidence Act 1950 the child's evidence must be corroborated or there must be some other evidence implicating the accused's before he can be convicted¹¹. This has the effect that when a child is allowed to give evidence not on oath or affirmation, the court must caution the child "to speak the truth, the whole truth and nothing but truth".

The above case shows that even though the elements of section 354 have been fulfilled, the accused still cannot be convicted if the evidence of the child is not fully corroborated.

The same principle is also highlighted in most of decided cases in Singapore as regards the offence under section 354¹².

Thus, it is submitted that outraging modesty as in section 354 requires a strict rule of corroborative evidence. Attention must be paid to the nature of the corroboration and the question of what exactly is meant to be corroborated. The courts have a tendency to exercise great care when assessing the weight of the corroborative evidence. Then only it is safe to convict the accused person for the offence of outraging modesty.

From the elements of sections 509 and 354, it is unclear whether sexual harassment is recognised as a major form of sexual offences in the Penal Code. This is due to the fact that none of the words used in both provisions denotes "sexual harassment". The provisions do not precisely define what sexual harassment is. Though there are words such as "insulting the modesty" and "outraging modesty", they are too general to be interpreted as sexual harassment.

CODE OF PRACTICE ON THE PREVENTION AND ERADICATION OF SEXUAL HARASSMENT IN THE WORKPLACE 1999.

With the increase number of sexual harassment cases, especially in the workplace, the Code Of Practice On The Prevention And Eradication Of Sexual Harassment 1999 has been launched by the Minister of Human Resources Ministry, Dato' Lim Ah Lek, on the 1st March, 1999. The code contains few guidelines on the establishment and implementation of in-house preventive and redress mechanism for dealing with sexual harassment in the workplace. The introduction of the code indicates the commitment and concern of the Ministry to achieve a safe work place for its employees.

BRIEF CONTENT OF THE CODE

The Code 1999 contains 34 Articles relating to every aspect of sexual harassment in the workplace. The code provides a comprehensive definition of sexual harassment. Article 4 of the code defines sexual harassment as 'any unwanted conduct of a sexual nature having the effect of verbal, non-verbal, visual, psychological or physical harassment :

- (i) that might, on reasonable grounds be perceived by the recipient as placing a condition of a sexual nature on her or his employment, or
- (ii) that might, on reasonable grounds be perceived by the recipient as an offence or humiliation, or a threat to her or his well-being, but has no direct link to her or his employment

Sexual harassment as provided in Article 4 above, is not only defined clearly, but one advantage is; it is gender neutral which means to say that it can be sexual harassment by a woman towards a man, or those from the same sex. Thus, the code applies to everybody who is sexually harassed, not confining to women as in usual cases.

Article 5 divides sexual harassment into two categories, sexual coercion and sexual annoyance. Sexual coercion is sexual harassment that results in some direct consequences to the victim's employment. For example, where a superior who has power over salary and promotion, attempts to coerce a subordinate to grant sexual favors. If the subordinate accedes to the superior's sexual solicitation, job benefits will follow. Conversely if the subordinate refuses, job benefits are denied. On the other hand sexual annoyance is sexually-related conduct that is offensive, hostile or intimidating to the recipient, but nonetheless has no direct link to any job benefit. However the annoying conduct creates a bothersome working environment which the recipient has no tolerance in order to continue working. For example, a sexual harassment by an employee against a co-employee or by a company's client against an employee.

The code also covers any employment-related sexual harassment occurring outside the workplace such as work related travel or social functions, job assignments, conferences or training sessions, over the telephone and through the electronic media.¹³ Thus, it is not necessarily that sexual harassment occur inside the workplace, as long as the victim is doing her or his work, the code also extends its application to such situations. This right of employees should be made well-known to them since they might presume that the code only covers the conduct of sexual harassment which happens in the workplace.

A range of behaviour that constitutes sexual harassment has been listed in Article 8 of the code. By virtue of Article 8 there are 5 forms of sexual harassment, namely, verbal harassment, for example; offensive or suggestive remarks, comments, jokes, jesting, kidding, sounds, questioning, non-verbal or gestural harassment for example; leering, ogling with suggestive overtones, licking lips or holding or eating food provocatively, hand signal or sign language denoting sexual activity, persistent flirting, visual harassment for example; showing pornographic materials,

drawing sex-based sketches or writing sex-based letters, sexual exposure, and psychological harassment for example; repeated unwanted social invitations, relentless proposals for dates or physical intimacy, physical harassment for example; inappropriate touching, patting, pinching, stroking, brushing up against the body, hugging, kissing, fondling, sexual assault.

Besides those important elements in the code, it also recommends a comprehensive in-house mechanism which employers are encouraged to set up to address the problem of sexual harassment.¹⁴ The mechanism should include a policy statement prohibiting harassment in the organisation¹⁵, a clear definition of the offence¹⁶, complaint or grievance procedures¹⁷, disciplinary rules and penalties against culprits and those who make false accusations¹⁸. Articles 23 to 26 provide for protective and remedial measures for the victim, which include confidentiality for the victim as to minimise her or his embarrassment. Apart from this, it should also have promotional and educational programmes to explain the company's policy on sexual harassment and to raise awareness of sexual harassment and its adverse consequences among the company's employees, supervisors and managers¹⁹.

With the introduction of The Code, it is vital for victims of sexual harassment at the workplace to report the incident immediately. There is no other way to put a stop to such harassment unless the victims come forward with an immediate complaint. On the part of the employers, they must take effective measures to ensure that all complaints are handled seriously and quickly, while protecting the confidentiality of the victims.

COMMENTS

As we can see, the only provisions of law pertaining to the offence of sexual harassment are sections 509 and 354 of the Malaysian Penal Code. The Code 1999 is actually not a piece of legislation, thus it has no legal effect in its implementation. Though the code is a good solution in eradicating the problem of sexual harassment, it does not give a comprehensive effect. It only serves a guideline to the employers and employees for proper conduct in the workplace, with certain disciplinary actions. The code incorporates only sexual harassment in the workplace, while excluding others who are not in a workplace. In reality, sexual harassment is not simply confined to this setting only, but it can take place on the streets and in public settings for example between doctor and patient or teacher and student. In such situation, the code is merely left as a code of practice, without any sanctions for breaches of the code. Therefore, the only provisions of law governing the offence of sexual harassment are sections 509 and 354 of the Penal Code. The question is; how far do the provisions protect the victims?

The writer is of the opinion that the Penal Code does not absolutely protect the victims of sexual harassment. This is due to the fact that there is no specific definition for it in the provisions. The Penal Code should provide a clearer definition for sexual harassment. The words that have been used are "*outraging*

modesty", not "*sexual harassment*". One might argue that the act of outraging modesty is more serious than the act of sexual harassment itself. This is evident in section 354 which requires a proof of an assault or a criminal force, otherwise to constitute a sexual harassment, no such requirement is needed. As long as the conduct of the harasser is unwanted or unwelcomed by the victim, that alone can constitute sexual harassment. Therefore, the Penal Code should provide a comprehensive definition for sexual harassment, so that the act can be interpreted properly by the judges. Perhaps the definition and the categorisation used in the Code 1999 can be adopted as to give the proper meaning of sexual harassment, taking into consideration that it should not be confined to a workplace only.

Under the existing provisions of section 354 and 509, it is difficult for the victim to succeed because of the strict requirement of corroborative evidence. There is a tendency that the charge will fail without a cogent corroboration. It seems that the burden of proof in such cases is very high. Like section 354, section 509 of the Penal Code, though seems to protect the modesty of a woman, also does not give the definition for "*modesty*" itself. This will lead to inconsistencies among the judges to define the act of insulting the modesty of a woman. Furthermore, this provision of law confines its application to women only, because it specifically mentions the phrase "*to insult the modesty of any woman*". For that reason, if the victim is a man, he deserves no protection under section 509. The section should not use the word "*woman*", perhaps it can be replaced with the word "*person*", thus it will cover man as well.

It is submitted that the Penal Code only provides for an offence of outraging modesty or indecent assault, which is to some extent different from the act of sexual harassment itself. The modern changes in today's life have contributed to stimulate sexual harassment in various degree, for example the new issue now is sexual harassment on the internet. Therefore, the provisions are certainly vague and inadequate as to protect the victims of sexual harassment. They need to be suitably amended, especially relating to the definition of sexual harassment. The definition has to be very specific and comprehensive so as to include every act of sexual harassment such as psychological, verbal, visual, non-verbal, gestural and physical forms of sexual harassment. Thus, not only a victim of an indecent assault is protected, but the protection shall also be extended to all the victims of various forms of sexual harassment. Though we do not have a Sexual Harassment Act specifically, but with the proposed amendment, the provisions of the Penal Code will suffice to solve the problems of sexual harassment.

CONCLUSION.

As a conclusion, the law relating to sexual harassment has to be evaluated, because the impact it brings on the victims, mainly women, is profound. It is no doubt that the Code 1999 plays a significant role in addressing the problem, but it is not a law or legislation which can be enforced legally. The code only provides a guideline for safety and security at the workplace. This alone cannot justify the fact that we

still need to have the force of law to prevent and eradicate the offence of sexual harassment efficiently.

ENDNOTES.

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¹L.B Curzon, 1995, Dictionary Of Law, p.175.

²Hazel Houghton - James, 1995, Sexual Harassment, p.6.

³K.D Gaur, 1992, A Textbook On The Indian Penal Code, p.694.

⁴Hamid Sultan bin Abu Backer, 1994, Janab's Key To The Law Of Evidence In Malaysia And Singapore, p.575.

⁵ Assault is provided in section 351 of the Penal Code, which states:

Whoever makes any gesture or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes the gesture or preparation is about to use criminal force to that person, is said to commit assault.

⁶ Section 350 provides for criminal force, which reads :

Whoever intentionally uses force to any person without that person's consent, in order to cause the committing of any offence, or intending by the use of such force illegally to cause, or knowing it to be likely that by the use of such force he will illegally cause injury, fear, or annoyance to the person to whom the force is used, is said to use criminal force to that other.

⁷[1950] 16 MLJ 33.

⁸ See also *PP v Basar* (1965) 1 MLJ 75 and *Samuel T. Ponampalan v PP* (1985) 2 CLJ 86 where the court requires a strict and heavy burden of corroborative evidence in section 354.

⁹(1994) 2 CLJ 383.

¹⁰ Section 133A of the Evidence Act 1950 provides :

Where in any proceedings against any person for any offence, any child of tender years called as a witness does not on the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code of the Federated Malay States shall be deemed to be a deposition within the meaning of that section :

Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

¹¹ Hamid Sultan bin Abu Backer, 1994, Janab's Key To The Law Of Evidence In Malaysia And Singapore, p. 539.

¹² See *John Benjamin Cadawanalharavil v PP* 3 SLR 805 and *Khoo Kwoon Hain v PP* (1995) 2 SLR 767.

¹³ See Article 6 of the Code of Practice.

¹⁴ See Article 9 of the Code of Practice.

¹⁵ The policy statement is a documented message from the management to employees expressing the company's policy and philosophy to prevent and eradicate sexual harassment, as to create a positive and conducive working environment. See Article 10 to 12 of the Code of Practice.

¹⁶ This is important to give awareness to the victims of what actually considered as sexual harassment. See Articles 13 and 14 of the code.

¹⁷ See Articles 15 and 16 of the Code of Practice.

¹⁸ Articles 19 to 22 of the Code of Practice.

¹⁹ Articles 27 to 30 of the Code of Practice.