

LGBT AND THE ISSUE OF SEXUAL HARASSMENT IN MALAYSIA

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Abstract

Sexual harassment is one of the most hideous acts which can happen to anyone. Such act can happen to anybody regardless their gender, age, skin color or religious belief. It can also happen to the LGBT (Lesbian, Gay, Bisexual and Transgender) community. The reported cases of sexual harassment towards LGBT community not only occur in our country but almost in all countries all over the world. Sexual harassment towards LGBT community can happen at any stages of their life starting from their children hood up to adulthood. Such harassment can also happen to LGBT community at the workplace. Due to the sexual harassment which being faced, it would be difficult for the LGBT community to carry on with their life and do changes in their life path as most people in the country hope for. Being a minority or different does not mean they can or should be subjected to sexual harassment or any improper behaviors from anyone. No one has the right to condemn or even harass a person in such a way which can put the person under constant pressure or having fear for their own life. As such, it is the object of this paper to examine closely on the issue of sexual harassment particularly towards the LGBT community. The paper analyzes the definition of LGBT and sexual harassment itself, cause and effect of sexual harassment towards LGBT community, the existing legislations in the country which can be used to prevent sexual harassment from happening not only to the LGBT community but to anyone in the country as well as identifying the best solutions or recommendations to prevent sexual harassment from happen to LGBT community.

Keywords: *LGBT, Sexual, Harassment, Gender, Age.*

INTRODUCTION

LGBT initials that stands for lesbian, gay, bisexual, and transgender. Such initial has been used to describe those community since the 1990s at over the world particularly among the western countries. At the beginning, the term gay has been used to cover such community. However, many activists believed that the term gay community did not accurately represent all those to whom it being referred to. Due this reason, the initials LGBT has been created to accurately represent such community (Acronyms, Initialisms & Abbreviations Dictionary, 1985).

It is important to know each of the initial which define the LGBT community before we can go further. A lesbian is a homosexual woman or same – sex attraction between women. The word lesbian is also used for women in relation to their sexual identity or sexual behavior regardless of sexual orientation (Zimmerman, 2000).

Gay is a term that primarily refers to a homosexual person or the trait of being a feminine (Craig J. Forsyth, Heith Copes, 2014). Transgender may also include people who belong to a third gender, or else conceptualize transgender people as a third gender (Joan C. Chrisler, Donald R. McCreary, 2010).

Being a transgender normally being regarded as being independent of sexual orientation as transgender community may identify themselves as heterosexual, homosexual, bisexual, and others. Whatever group these people might belong to, one common thing which is very much certain is that all of them are potentially been exposed to sexual harassment, violence, and discrimination (Sejal Singh and Laura E. Durso, 2017).

SOCIETY PERCEPTION ON LGBT COMMUNITY

Every society has their view and perception toward LGBT community depending on the society religion, culture, and level of understanding toward LGBT community. It is very important to note that many religions in the world including cultures does not recognized the activities carry out by LGBT community which being seen as

homosexual (Hobson, 2001). In modern time, the term gay has come to be used as a reference to a specific community, practices and cultures associated with any activities involving the act of homosexuality.

In the 1960s, the term gay became the word favored by homosexual men to describe their own sexual orientation and activity. By the end of the 20TH century, the term gay was recommended by major LGBT groups and style guides to describe people attracted to members of the same sex (Avoiding Heterosexual Bias in Language, 2015).

Bisexuality is a sexual attraction or sexual behavior toward both males and females. It may also be defined as romantic or sexual attraction to people of any sex or gender identity. (Sexual orientation, homosexuality and bisexuality, 2013). Transgender people have a gender identity or gender expression that differs from their assigned sex (Terry Altilio, Shirley Otis-Green, 2011).

It may include people who are not exclusively masculine or against the normal practice of human being. (Moaz Nair, 2018).

There have been many religions teaching which forbid any act which against the normal practice which being ordained by God to all human being. When it come sexual relationship, all religions, particularly Islam strictly command such relationship to be only between man and women. It cannot be done in any other way. Same position also been taken in Christianity.

Often, we heard the phrase God only created “Adam and Eve” and not “Adam and Steve”. Adam and Steve are a phrase that originated from a conservative Christian slogan “God made Adam and Eve, not Adam and Steve”, intended to concisely summarize Judeo – Christian Bible – based arguments against gay sexual practices or homosexuality activities.

Among other things, such phrase implies that the natural way of life for humanity is illustrated by the Biblical account of the creation of human beings as a male–female pair (Clarke, September–October 2001).

According to the mind of the conservative people, it would be unthinkable for anyone to go against such normal practice and get involve with LGBT community. According to the some, those who involve with LGBT community often been seen as against the wishes of God and will be exposing themselves to condemnation from God Himself (Can refer further to Mohd Radzi Mohd Zain, 2019).

Due to this simple facts, LGBT community across all over the world as well as in Malaysia facing with many challenges in order for them to survive and to become part of the society. The objection which being faced by the LGBT community not only come from religious, moral or even constant negative perception which most people have toward LGBT community, but it also come from legal position which most countries have towards LGBT community.

INTERNATIONAL STATUS ON LGBT COMMUNITY

Many countries do not recognize the existence of LGBT community including Malaysia. However, in 2011, the United Nations Human Rights Council had passed its first resolution recognizing LGBT community rights, following which the Office of the United Nations High Commissioner for Human Rights issued a report documenting violations of the rights of LGBT people, including hate crimes, criminalization of homosexual activity, and discrimination.

Following the issuance of the report, the United Nations (UN) urged all countries in the world which had not yet done so to enact laws protecting basic LGBT rights in their respective country. (Jill Dougherty, 2011). As to the year 2019, 27 countries across the world has gave their recognition towards LGBT community mostly in terms of recognizing same – sex marriage. However, there are several countries impose a very harsh punishment to the LGBT community like death penalty. Those countries include Afghanistan, Brunei, Iran, Mauritania, Pakistan, Qatar, Saudi Arabia, Sudan, Yemen, the United Arab Emirates and parts of Nigeria, Somalia, Syria and Iraq (Samantha Dick, 2019).

RULES AND REGULATIONS TARGETING LGBT COMMUNITY

All over the world, rules and regulations which has been made related to LGBT community includes laws concerning the recognition of same – sex relationships, including same – sex marriage, civil unions, and domestic partnerships, laws concerning LGBT parenting, including adoption by LGBT community, anti – discrimination laws in employment, housing, education, public accommodations, anti – bullying legislation to protect LGBT community children at school, hate crime laws imposing enhanced criminal penalties for prejudice – motivated violence against LGBT community, bathroom bills affecting access to sex – segregated facilities by transgender community, laws related to sexual orientation and military service, laws concerning access to assisted reproductive technology, sodomy laws that penalize consensual same – sex sexual activity, age of consent laws that may impose higher ages for same – sex sexual activity, laws regarding donation of blood by men who have sex with men, laws concerning access to sex reassignment surgery and hormone replacement therapy, as well as legal recognition and accommodation of reassigned gender.

In Malaysia, the government has not recognized the sexual activities carry out by LGBT community. Malaysian law currently provides for whipping and up to a 20-year prison sentence for any homosexual acts involving either men or women in the country (Anti – LGBT laws: Malaysia, 2019).

Malaysian law on homosexual activity is codified under the heading of “Unnatural Offence” of the Penal Code [Act 574]. Section 377A of the Penal Code [Act 574] states that “Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature”.

Penetration is sufficient to constitute the sexual connection necessary to the offence described under this section. Section 377B of the Penal Code [Act 574] states “Whoever voluntarily commits carnal intercourse against the order of nature shall

be punished with imprisonment for a term which may extend to twenty years and shall also be punished with whipping”.

Section 377C of the Penal Code [Act 574] states “Whoever voluntarily commits carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting the other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be punished with whipping”.

Section 377CA of the Penal Code [Act 574] states “Any person who has sexual connection with another person by the introduction of any object or any part of the body, except the penis into the vagina or anus of the other person without the other person’s consent shall be punished with imprisonment for a term of not less than five years and not more than thirty years, and shall also be liable to whipping”.

Section 377D of the Penal Code [Act 574] states “Any person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years”.

Besides having been subjected to the country criminal prosecution, the LGBT community may also be subjected to the country Islamic criminal offense. Several states in Malaysia have instated Islamic criminal laws, applying to male and female Muslims, criminalising male and male as well as female and female sexual acts with the punishment up to three years imprisonment and whipping.

Section 25 of the Syariah Criminal Offences (Federal Territories) Act 1997 [Act 559] for example states “Any male person who commits liwat (sodomy) shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof”.

Section 26 of the Syariah Criminal Offences (Federal Territories) Act 1997 [Act

559] states “Any female person who commits musahaqah (Lesbian relations) shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof”.

PROBLEMS FACED BY LGBT COMMUNITY

LGBT community has to keep their identity in silent in order for them to continue with their living and to protect themselves from any acts of sexual harassment, violence and discrimination.

Such acts of sexual harassment, violence and discrimination can happen to the LGBT community regardless the location whether they are walking or driving on road, do a small shopping at malls or shops, waiting for a bus at bus stop, and others.

The LGBT community also can face with such problems at workplace or even in school and universities. (Tyler Kinkade, 2015). Labelling and wild accusation has become part and parcel of the life of LGBT community for many years and in many societies. Being different and a minority in the society, the LGBT community faces even exposure to sexual harassment.

Since the issue or any issues concern LGBT community is considered taboo in this country, it is very difficult to locate the exact number of LGBT community we have in Malaysia as well the exact number of reported sexual harassment being faced by the LGBT community in the country.

However, a reference can be made to the research which being done in the United Kingdom recently in early 2019 over the issue of sexual harassment of LGBT community particularly at the workplace.

According to the research which being conducted, around seven out of ten LGBT workers experienced at least one type of sexual harassment at work (A total of 68 per cent) and almost one in eight LGBT women (A total of 12 per cent) reported being seriously sexually assaulted or raped at work.

However, this is a hidden problem with two thirds of those who were harassed

not reporting it and one in four of those who did not report the harassment being silenced by fear of outing themselves at work. (Sexual harassment of LGBT people in the workplace, 2019).

LGBT COMMUNITY IN MALAYSIA

It is very hard to know the exact number of LGBT community in Malaysia due to the fact that such community is not recognized by the government. The Malaysian society also refused to give any recognition over such community. Many of individuals belong to such community has to keep their LGBT identity in secret fearing over punishment by the country laws, reprisal by the society or being subjected to harassment.

There is no deep study been conducted on the matter. Though there are no in deep study which being conducted towards LGBT community in the country presently, but in recent years, Malaysian has been exposed with many reported cases or incidents of harassment and assault which happen to the LGBT community (Free Malaysia Today, June 12, 2019, Free Malaysia Today, June 13, 2019, Malaysiakini, June 15, 2019, The Star Online, 14 August 2018, Greg Blackman, August 28, 2018, and Audrey Dermawan, New Straits Times, 15 June 2017).

DEFINITION OF SEXUAL HARASSMENT

It is very difficult for us to locate the exact meaning of the word sexual harassment. Up to today, there is no single acceptable universal agreement on the definition of sexual harassment itself.

However, based on many discussions as well as reference which being made to rules and regulations from many jurisdictions including in Malaysia pertaining to the matter as well as philosophical debate and discussion among academic all over the world, sexual harassment can be understood and define as any sexual in nature statement or act which is unwanted or unwelcome committed by the perpetrator towards the victim (Ahmad Shamsul Abd. Aziz, 2005 and Catherine A. MacKinnon, 2005).

To establish sexual harassment in terms of specific acts or behavior is highly difficult because the acts of sexual

harassment are hard to be measured (Ashgar Ali Ali Mohamed, 2004).

Therefore, there is a need to look at the context, the surrounding circumstances which include the victims' upbringing, culture as well as religious sensitivities before any final decision is to be given on the allegation which been put forward.

Every nation has their own way and interpretation on establishing the allegation of sexual harassment. What is really required here is that the act or conduct of the perpetrator must be offensive which would affect the state and mind of the victim and it must relate to sexual matter.

With the coming of new communications technologies, sexual harassment at the workplace may also take place through phone, Short Message Service (SMS), Multimedia Messaging Service (MMS), Internet Electronic Mail (E-Mail), Facebook, Twitter, WhatsApp, Instagram or other medium (Tengku Dato' Omar Tengku Bot & Maimunah Aminuddin, 2000).

In Malaysia, any detail reference towards the definition of sexual harassment at the workplace can be referred to the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace (hereinafter referred to as "the Code").

The state-drafted Code was introduced by the Malaysian Ministry of Human Resources (MOHR) in August 17, 1999. According to the Code, sexual harassment has been defined as any unwanted conduct of a sexual nature.

Sexual harassment encompasses various conducts of a sexual nature which can manifest themselves in five possible forms namely verbal harassment (Paragraph 8 (i) of the Code give the examples of offensive or suggestive remarks, comments, jokes, jesting, kidding, sounds, and questioning), non – verbal or gestural harassment (Paragraph 8 (ii) of the Code give the examples of leering or ogling with suggestive overtones, licking lips or holding or eating food provocatively, hand signal or sign language denoting sexual activity, and persistent flirting), visual harassment (Paragraph 8 (iii) of the Code give the examples of showing pornographic materials, drawing sex – based sketches or

writing sex based letters, and sexual exposure), psychological harassment (Paragraph 8 (iv) of the Code give the examples of repeated unwanted social invitations, relentless proposals for dates or physical intimacy), and physical harassment (Paragraph 8 (v) of the Code give the examples of inappropriate touching, patting, pinching, stroking, brushing up against the body, hugging, kissing, fondling, and sexual assault). Such act of sexual harassment can also take place in the form sexual violence and discrimination.

CAUSE AND EFFECT OF SEXUAL HARASSMENT TOWARDS LGBT COMMUNITY IN MALAYSIA

It is very difficult to find the exact reason why the LGBT community has been subjected to sexual harassment, violence and even discrimination. However, from the highlighted explanations given above we could come to conclude that the reason why such ill treatment continues to happen to them is due to social stigma on part of the society over the LGBT community themselves. Many in the society regard LGBT community as a pest which need to control and even be destroyed.

Many in the society see LGBT community as something which can destroy the existing structure of the conservative society which still uphold religion, tradition and moral values. LGBT normally been seen by the society as a group which against the existing norms and against the religion.

Though not all to be blame on the matter, some people within the society simply refuse to tolerate with the existence of the group and often tend to use sexual harassment, violence and discrimination as the way to deal with such LGBT community.

The use of sexual harassment, violence, discrimination has been done not only towards the LGBT community, but also has been carried out towards other groups of people in the country especially those groups of people perceived to be in weak position and those who are being a minority in the society like women, persons with disability and certain ethnics group or races.

Often being seen as weak as well as being seen as a minority group of people,

the LGBT community in the country are being exposed with many kinds of sexual harassment and even sexual assault. The existence of certain individual or groups in the country which encourage the use of harassment and violence may also give rise to the problem to the LGBT community in the country.

Some people in the society have been heavily influenced by those extremist individual and groups to carry out the ill – treatment towards the LGBT community. According to Dr Michael Kaufman, one of the founders of the White Ribbon Campaign in 1991, violence against women is due to patriarchal power, privilege and permission of society.

This can be extended to LGBT community who identifies their sexual identity as women. Patriarchal power is defined by as led by men in the decision making in family, community or society as a whole. The patriarchal power gives the impression that men has the privilege to do what they need to maintain the power. Permission is given when a wrong by the perpetrators, mostly men, are not rebuked or punished by the community or society.

This gives them the permission to carry on with the violence to keep the women in place, discriminating them and actions of violence against them. All these actions are experienced by the LGBT communities as well.

If ill treatment continues to happen toward the LGBT community, the outcome can be very disastrous not only to the LGBT community but also to the society and the country entirely. If the sexual harassment, violence, and discrimination proceed, LGBT community will constantly becoming a target by anyone who has evil motive towards such community. LGBT community will be further subjected to many kinds of ill treatment which could harm the community mentally and emotionally.

If these were to happen, such community will face mental and psychological problems which is hard to cure thus create or bring additional problem for the country. Such ill treatment may also turn into physical assault or violence like molestation, sexual assault, sodomy or even rape.

If these criminal acts to happen, it would increase the level of crimes in the country and most important it would put the life of the LGBT community in danger. LGBT community may also be subjected to discrimination and often being excluded by the society for any activities or programs.

Such discrimination and exclusion will make the LGBT community isolated from the society and country development. Similar like normal people, there are many individuals in the LGBT community who are well educated and having special skills which can be useful for the country development. Ignoring them would bring a great loss to the country progress.

EXISTING LAWS TO PROTECT LGBT COMMUNITY FROM SEXUAL HARASSMENT, VIOLENCE AND DISCRIMINATION

Presently, there is not specific law which LGBT community can use to protect themselves from act of sexual harassment, violence and discrimination in the country.

It must be noted that the Federal Constitution of Malaysia under Article 8(2) should also cover the LGBT community as the article states “not discriminated based on gender”.

All the existing laws which exist in the country do provide the necessary protection for anyone including to the LGBT community from being subjected to any kind of ill treatment. If the matter being reported to the police, the police may investigate the issue under any existing provisions provided under the Penal Code [Act 574].

According to the Royal Malaysia Police, if there is a report of crime concerning sexual harassment, it normally being investigated under four main sections under the Malaysian the Penal Code [Act 574] namely Section 354 which provides for assault or use of criminal force to a person with intent to outrage modesty, Section 355 which provides for assault or criminal force with intent to dishonour a person, otherwise than on grave provocation, Section 375 which provide for rape and Section 509 which provides for word or gesture intended to insult the modesty of a women.

Labour laws also have been utilized to combat the issue concerning sexual harassment in the country. There is various labour legislations which can be utilize by the victim of sexual harassment especially when it happens in the workplace. The Employment Act 1955 [Act 265] forms the primary legislation on employment in Malaysia, providing guidelines on minimum employment rules within which to operate businesses.

In early 2012, the Malaysian government has step up their effort in combating the issue of sexual harassment in the workplace in the country by adding new part under the Employment Act 1955 [Act 265] known as Part XVA with the heading “Sexual Harassment”.

The victim of sexual harassment can also bring their case under the Industrial Relations Act 1967 [Act 177]. In Malaysia and in most of the common law countries where the employee has found the work environment to be uncomfortable and insufferable due to sexual harassment or where the employer or management has not dealt adequately with his or her complaint and he or she resigned as a result, he or she may later claim for constructive dismissal.

Under Section 20 of the Industrial Relations Act 1967 [Act 177], a workman who considers his dismissal as without just cause or excuse may file a claim for reinstatement within 60 days of his dismissal. Upon receiving the representation by the workman, the department will invite both the employer and workman for a conciliation meeting.

The Conciliation Officer’s role will be to explain the practices and principles of law that are applicable including judgment of the courts, both the Industrial Court and civil courts, so that the parties are aware of their rights and liabilities.

With this explanation it is expected that they would be able to resolve their differences and come to an amicable settlement. If the conciliation efforts fail, the case will then be referred to the Honourable Minister of Human Resources who will exercise his discretionary powers to refer the matter to the Industrial Court or otherwise. When a reference is made to

Industrial Court, the court will adjudicate the matter.

CONCLUSION

Every human being deserves to be respected and this include the LGBT community. Though LGBT community has chosen a different life style unlike majority of the people, this does not mean that such community should be subjected to any kinds of harassment including sexual harassment.

As stated in the research, sexual harassment is a hideous act which should have not be done to anyone. Unlike other kinds of act, sexual harassment will humiliate a person to the extend which is hard to for the victim to rise back and become part of the society.

Sexual harassment can take place in different forms. Whatever forms it take, the effects sexual harassment brings to the victim is negative. Every society including us in Malaysia has their own view towards LGBT community.

Whatever view we have towards such community, we must never allow ourselves and our society to cross the line to commit any act which not only will make things worse for the LGBT community but also against the existing country laws.

As for the LGBT community, it is very important for them to stand up for their rights as a citizen of the country. Though the country law does not recognize the existence of LGBT community per se, it does not mean that they are been exempted to get any legal assistance to protect their rights or to seek any protection from hostile people or group.

LGBT community has the legal right to bring any legal action under any existing country to protect themselves from been subjected to sexual harassment and from any kinds of illegal actions or criminal acts been done to them. It is very important for everyone to obey the country laws and not to do anything which is clearly against the rules. Living together in peace and harmony is much better than living in endless chaos, conflict and fighting.

RECOMMENDATIONS

The issue of sexual harassment, violence and discrimination towards LGBT community must be tackle professionally. This can be done through enforcement of all existing legislations, including the Constitution, which can be used to address the issue concerning sexual harassment in the country.

The police as the main enforcement authority in the country must take the issue of sexual harassment, violence and discrimination seriously. The police must provide adequate protection to all victims of sexual harassment including to the LGBT community.

Due to the status of LGBT community, existing legal protections and workplace initiatives in the country are not adequately addressing the scale and seriousness of this issue. Additional legal protections and new ways of tackling sexual harassment are needed and if they are to be successful, they must be designed to include the specific experiences of LGBT community in the country.

The government must take steps to ensure LGBT workers in particular are effectively protected from sexual harassment and sexual assault in the workplace. Most of LGBT workers who've been sexually harassed don't report it to their employer because the fear of being victimize or being subjected to humiliation.

In order to encourage the LGBT victim to come forward, the government need to consider creating a new mechanism for the LGBT victim to come forward and make a complaint or report for the sexual harassment, violence or discrimination which been faced by them.

To make sure LGBT community will not be subjected to sexual harassment, violence and discrimination, everybody in the country must play their role. This issue cannot be left to the government entirely. The society must change their behavior and attitude towards LGBT community.

Though the Malaysian government and majority of the people in the country are strongly against recognizing the LGBT community, this does not mean such LGBT community should be subjected to any kinds of ill treatment. Constant education

and awareness must be carried out to the society by any relevant agencies in the country so that LGBT community will not be subjected to further humiliation and attack.

Religious authorities must also preach the people over the proper way of doing their dakwah or efforts to call people back to the true teaching of the religion. Doing harassment and violence is not the way which to be used for such purpose. All religions teach the importance of value, mutual respect and tolerance when we want call people to the right path, not hostility, name calling, or assaulting people.

As for LGBT community, they must try their best to find way to exist along with the community and not to do anything which can provoke the society surround them. LGBT must respect the existing position of Islam as the main religion in the country and respect all the principles and stand taken by Islam towards LGBT issue.

Any misunderstanding or conflict between the LGBT community and the society must be resolve through peaceful way like consultation and discussion. Everybody must avoid doing open hostility as it can easily give rise to the problem concerning sexual harassment and other kinds of hostile behaviors. The society also needs to practice in accordance to Sustainable Development Goals, Agenda 2030 which the country has implemented since 2016, especially Goal 5 on Gender Equality with the tagline of “leave no one behind”.

This would need the society to uphold the rights of individuals who are part of the LGBT community made up individuals from various ethnicity and religions, apart from Malay Muslims, and find ways to live harmoniously, free from sexual violence, including sexual harassment, to make them productive in society and country. Let's start by respecting all individuals!

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