1. Introduction

A supervisor rested his hand casually on the shoulder of a female employee who was engaged with a client over the phone. He gave her a massage as if appreciating her hard work and his hands slowly moved downwards... "Come on and sit on my lap, said the supervisor, you have just closed your first sales confirmation, this is the office tradition...". "I have some Christmas presents for you all, he said, here is a nipple patch for you, and you have a G-String panty, come let me put it on you" (extract of a police report made by victims of sexual harassment, cited from the Sunday Star September 12, 1999 at p. 20).

No employee with self-respect and self-esteem would bear such insults. Outraging the modesty of colleagues or using obscene language, suggestive remarks and unwanted physical contact is improper, unbecoming and totally unacceptable as it is derogatory to the standards of behaviour expected in the workplace. Even a single incident of unacceptable behaviour is sufficient to constitute a detriment.

The workforce in Malaysia comprises of both men and women who are equally committed to nation building and to lead the country to its vision and mission. Women comprises of some forty seven percent of the workforce, some of them holding high ranking positions with the majority of whom are holding auxiliary positions. While employment occupies a central role in a person's life by providing basic necessity of life besides a sense of identity and worth, safety of their being at the workplace is equally important.

Generally, women holding auxiliary positions or subject to superior's evaluation have been known to be vulnerable to sexual harassment and this, if goes unchecked in the workplace, will create "intimidating, hostile and offensive work environment which can adversely affect the industrial relations climate in the organisation" n1. Apart from that, it also affects the employee's morale and job performance.
Sexual harassment is arguably a violation of Article 8(1) of the Federal Constitution that provides, "all persons are equal before the law and entitled to the equal protection of the law". It caters to the dignity and equality of human person and envisages the significance of equal rights for men and women. In this regard, the paper will examine the protection accorded to workers who have been sexually harassed by their employers or co-workers.

2. Sexual harassment: An overview

Although sexual harassment usually occurs between people of the opposite sexes, it can also take place between the same sexes. There are two parties involved, namely, the victim and the perpetrator, and it can arise through peer relationship or power relationship. Usually, it is done by a person in a superior position, for example, a superior male employee harasses the female subordinate or vice versa. On the other hand, it can also take place the other way round where an act of sexual impropriety of an employee against his superior or against his peer and it should be regarded as sexual assault, molest or outraging modesty. In addition, the subordinate employee could also perpetrate sexual blackmail to obtain an advantage to his/her position but to the detriment of his/her superior. For example, when the employee obtains evidence of compromising acts of his/her superior and uses such information to procure advantages through blackmailing the victim.

'Quid-pro-quo' is a Latin term which means 'this for that'. This is when the superior makes sexual advancements as a prerequisite of getting something in the workplace. It is when the superior compels the employee to perform sexual acts either in the positive or negative form. For example, "sleep with me and you'll get the job or promotion" or it can also arise in the negative form 'sleep with me or you're fired'. Sexual harassment can also arise without a demand for an exchange of sex for a job benefit. For example, where the employer or a supervisor or co-worker does or says things that makes the victim feel uncomfortable such as jokes, pictures, touching, leering, unwanted requests for a date, among others.

It is impossible to define sexual harassment in terms of specific acts or behaviour because incidents of harassment are difficult to measure. Therefore, one has to look at the context, the surrounding circumstances that include the victims' upbringing, culture and religious sensitivities, among others. What is emphasised here is that the conduct of the perpetrator must be offensive. If two employees have a good time exchanging sexual jokes, it would not be considered as sexual harassment. However, if one employee keeps telling another employee sexual jokes and the latter finds it offensive, it would constitute sexual harassment.

The following are conducts in which the courts have held to constitute sexual harassment, (a) physically molesting staff by touching parts of their bodies n2 ; (b) peeping into the toilet n3 ; (c) making suggestive comments as a reward for arranging transfer n4 , promotion with increase in salary n5 , and (d) suggestion of a lewd and sexual nature n6 .

All forms of sexual harassment in the workplace are unwelcome and unwanted by the recipients. In most cases, the victims are annoyed, angry and embarrassed by the unwanted sexual attention, as it negates and belittles their persons. The aggrieved worker may experience emotional trauma, anxiety, nervousness,
depression and feeling of low self-esteem. Besides creating a hostile and offensive work environment, it is derogatory to the standard of behaviour expected in the workplace. A worker who faces sexual harassment often chooses to resign from employment as they are threatened by the perpetrator from raising the problem, and therefore have often suffered in silence, as revealing it would tarnish their image.

The paper will look at the law and practice on sexual harassment in the workplace, from the statutory law and common law with some reference to Islamic law. The writer will examine the existing laws in Malaysia on the above subject and the common law approach which includes the employer's duty to provide safe and conducive working environment and the employee's duty of fidelity. Furthermore, the writer will also discuss the High Court's decision in Jennico Associates Sdn. Bhd. v Lilian Therera De Costa and Anor, n7 which is considered as the significant case on sexual harassment.

3. The Penal Code on Sexual Offences

There are provisions in the Penal Code on sexual assault on persons, grievous bodily harm or acts of indecency, for example, s 350 provides for the offence of using criminal force without the person's consent, s 354 - the offence of assault or use of criminal force to a person with intent to outrage modesty, s 376 - rape, s 377 - unnatural offences against a person, s 377D - outrage of decency and s 509 refers to words or gestures intended to insult the modesty of a person.

In particular, s 509 provides that "whoever intending to insult the modesty of any person, utters any word, makes any gestures or exhibits any object, intending that such words or sound shall be heard, or that such gestures or objects shall be seen by such person as intruding upon the privacy of such person shall be punished with imprisonment for a term which may extend to five years or with fine, or with both".

If a victim lodges a police report, investigation may be carried out and if the allegation is established, the accused may be charged in court under any of the above provisions, depending on the gravity of the offence and this is inclusive of offences of sexual harassment. However, this paper will only be dealing with sexual harassment in the context of industrial relations and excludes discussion under criminal law.

4. Sexual Harassment in the Workplace: The Law in Malaysia

Unlike in some developed countries where legislation exists to protect employees from inappropriate behaviour of a sexual nature, in Malaysia it is only provided in a code known as "Code of Practice on the Prevention and Eradication of Sexual Harassment in the Work Place" (hereinafter referred to as "the Code"). The Code was basically drawn up to guide the employer to set up an in-house mechanism that defines, regulates, investigates and penalises incidents of sexual harassment within the workplace. It is further intended to educate and create awareness, thereby ensuring a working environment free from the dangers of sexual harassment, apart from setting avenues for victims to lodge complaints to their management. The Code is not legally binding and therefore it will only remain as a guideline for proper conduct of employer and employee in the workplace. However, it is up to the discretion of the individual employer to lay
down a viable regulation mechanism based on the Code.

Before venturing into the definition of sexual harassment, it would be worthwhile to ponder on the following excerpts from the keynote address of YB Dato' Lim Ah Lek, the former Minister of Human Resources, Malaysia, at the official opening of the National Workshop on Sexual Harassment in the Workplace on 1 March 1999, at Kuala Lumpur. He said:

"Sexual harassment is one of the most offensive and demeaning experience an employee can suffer. For the victims, it often produces feelings of revulsion, disgust, anger, and helplessness. It damages the victim's health. It results in emotional and physical stress and stress-related illnesses. Victims may experience severe emotional trauma, anxiety, nervousness, depression and feeling of low self-esteem.

Sexual harassment adversely affects employee's morale and job performance. It reduces productivity and increases the rate of sick leave and absenteeism among affected employees. Moreover, many female employees who face sexual harassment choose to resign from their jobs rather than fight or endure the offensive conditions. This results in a high rate of employee turnover with all the associated costs in training and lost productivity. The greatest danger of sexual harassment is that when it goes unchecked, it can spread throughout an organisation like an infectious disease.

It has also been found that unchecked sexual harassment in the workplace creates intimidating, hostile and offensive work environment which can adversely affect the industrial relations climate in the organisation. An employer who ignores or condones sexual harassment in his establishment may also expose himself to legal action by the aggrieved employee who has been subject to the harassment. Sexual harassment in the workplace is also an employment-related safety and health problem.

By requiring a person to exchange sexual favour for economic survival, sexual harassment denigrates the victims and relegates them to a second-class status in the workplace. Viewed from this angle, sexual harassment is a gender discrimination which goes against the principle of equality of treatment in employment between the genders. Therefore, it inhibits the growth of a caring and just society. It also undermines the policy of the government to increase the participation rate of women in the labour force...".

As from the above passage, it is clear that sexual harassment, if goes unchecked, not only adversely affects an employee's morale and job performance but also their safety and health, besides undermining the principle of equality of treatment in employment. The Minister further added that the purpose of the Code was to provide practical guidance to employers, employees, trade unions and other relevant parties on the protection of the dignity of men and women at work. Its aim was to ensure that sexual harassment does not occur and, if it does occur, to ensure that adequate procedures are available to deal with the problem and prevent its recurrence.

The Code thus seeks to encourage the development and implementation of policies and practices which will ensure a safe and healthy working environment in every place of employment where individual employees, irrespective of status or position, are treated with dignity and free from any form of harassment, humiliation and intimidation of sexual nature.
(a) Sexual Harassment: The definition

Paragraph 4 of the Code defines sexual harassment to mean "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 his/her employment; or (ii) that might, on reasonable grounds, be perceived by the recipient as an offence or humiliation, or a threat to his/her well-being, but has no direct link to her/his employment".

Paragraph 5 divides sexual harassment into two categories;

(i) Sexual coercion for example where a superior, who has the power over salary and promotion, attempts to coerce a subordinate to grant sexual favour. If the subordinate accedes to the superior's sexual solicitation, job benefits will follow. Conversely, if the subordinate refuses, job benefits are denied.

(ii) Sexual annoyance refers to 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 to tolerate in order to continue working. A sexual harassment by a co-employee or by a company's client falls into this category.

Paragraph 6 further states that sexual harassment in the workplace includes any employment-related sexual harassment occurring outside the workplace as a result of employment responsibilities or employment relationship. Situations under which such employment-related sexual harassment may take place includes, but is not limited to: (i) at work-related social functions; (ii) in the course of work assignments outside the workplace; (iii) at work-related conferences or training sessions; (iv) during work-related travel; (v) over the phone; and (vi) through electronic media.

Paragraph 7 notes that sexual harassment refers to sexual conduct which is unwanted and unwelcome to the recipient. It is also a sexual conduct which is imposed on, and is unsolicited or unreciprocated by the recipient.

Paragraph 8 encompasses the various conducts of a sexual nature which can manifest themselves in five possible forms, namely: (a) verbal harassment such as offensive or suggestive remarks, comments, jokes, jesting, kidding, sounds, questioning; (b) non-verbal / gestural harassment such as leering or ogling with suggestive overtones, licking lips or holding or eating food provocatively, hand signal or sign language denoting sexual activity, persistent flirting; (c) visual harassment for example, showing pornographic materials, drawing sex-based sketches or writing sex-based letters, sexual exposure; (d) psychological for example, repeated unwanted social invitations; relentless proposals for dates or physical intimacy and (e) physical harassment, for example, inappropriate touching, patting, pinching, stroking, brushing up against the body, hugging, kissing, fondling, sexual assault.

Sexual harassment as noted from the above may be categorised as follows;

(a) Gender harassment which is the common type of sexual harassment. For example, graphic commentaries of the victims body; display of sexual suggestive objects or pictures at the workplace, describing victim in sexually degrading words, making proposition of a sexual nature;
(b) Seductive behaviour which involves unwanted, inappropriate and offensive sexual advances. For example, repeatedly unwanted sexual invitations or persistent letters, phone calls;

(c) Sexual bribery: solicitation of sexual activities or other sex-linked behaviour by the promise of a reward;

(d) Sexual coercion: insinuating, threatening or in any way implying that failure to sexually submitting to the aggressor would adversely affect the victim's livelihood, promotion, negative assessment of performance, among others;

(e) Sexual imposition involves physical touching, grabbing and fondling.

(b) The procedure of handling complaints of sexual harassment

The Code further provides guidelines to employers on the establishment of an in-house mechanism to prevent and eradicate sexual harassment in the workplace. Paragraph 10 of the Code requires that the company should introduce a policy statement which should provide (a) a declaration prohibiting sexual harassment in the organisation, (b) a caution stating that sexual harassment constitutes a breach of the company's policy and will incur disciplinary actions up to and including dismissal, and (c) a directive stating that supervisors and managers have a positive duty to implement the policy and to demonstrate leadership by example.

Due to the sensitive and personal nature of sexual harassment complaints, paragraph 16 of the Code provides that the employer should develop a separate complaint procedure to deal specifically with complaints. Paragraph 17 further provides that the complaint procedure should provide for measures to protect victims from further embarrassment in the course of reporting and investigation into the complaint. Paragraph 20 provides that the disciplinary rules should set out the penalties to which the harasser will be liable if the offence is committed. The nature and type of penalty should depend upon the severity of the offence. Paragraph 23 provides that to encourage victims to report sexual harassment, there should be adequate measures to ensure maximum confidentiality so as to minimise embarrassment to the victim, especially at the time of reporting and in the course of investigation into the complaint.

In a case where the victim of sexual harassment has suffered loss, such as a demotion or a denial of a promotion, para 24 provides that the said loss must be restored. Furthermore, para 25 requires that the victim should also be compensated for any monetary loss arising out of a denial of employment-related benefits which were rightfully due to him or her. Where the complaint is found to be unjustifiable and baseless, para 26 requires that appropriate remedy should be granted to the accused person if there has been any loss suffered by such person.

As stated earlier, the Code was basically drawn up to guide employers to set up an in-house mechanism to handle sexual harassment cases. However, it does not have any legal force and this does not prevent the victim from taking action at common law.
5. The Common Law Approach on Sexual Harassment in the Workplace

(a) Implied terms into the contract of employment

One should understand that it would not be possible to set out a complete set of express terms of what could or could not be done in the employment relationship. Hence, terms are implied into the contract of employment because of reasonableness, and are necessary in the contemporary modern world.

The terms implied can be divided into two, namely implied of law and implied of fact.

The terms are implied into the contract of employment with the aim of giving effect to the parties' intention, as if it had been brought to their attention - known as a bystanders test, or to give business efficacy. However, no terms can be implied where express terms already exist. Reference may be made to the English case of Hamlyn and Co v Wood and Co. Lord Esher MR stated that the "court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist." Having said the above, it is noted that the common law courts have implied among others, the employees duty of fidelity and the employers duty to provide safe and conducive working environment, which is discussed below.

(b) Employee's duty of fidelity

At common law, the employee's have a duty of fidelity towards the employer and this duty was first recognised by the English Court of Appeal in Lamb v Evans. The implied duty of fidelity had, since its reception, been applied in many different circumstances. It includes duty to render faithful and loyal service towards the employer; duty to obey lawful instruction; duty to exert reasonable degree of competence and skill; duty to protect employer's property; and in exercising trust placed on him by the employer.

It also includes duty not to resort to dishonest means to secure benefits at the employer's expense; not to accept commission, bribe and not to work in their spare time with a competitor of the original employer. The employee is also under a duty not to disclose confidential information acquired during the cause of employment. The duty not to disclose confidential information may vary depending on the nature of the employment. This obligation lasts until the end of the employment relationship. Some of this obligation such as preservation of the employer's confidentiality extends even after the end of the relationship.

Perhaps the most useful statement is found in the speech by Viscount Simonds in Lister v Ramford Ice and Cold Storage Co. Ltd. where His Lordship noted that:

"...It has been said on many occasions that an employee has a duty of fidelity to his employer, a general proposition that is indisputable. The practical difficulty in any given case is to find exactly how far that rather vague duty of fidelity extends. Prima facie it seems to me that on considering the authorities and the arguments that it must be a question on the facts of each particular case. It can very well be understood that the obligation of fidelity which is an implied term of the contract, may extend very much further..."
An employer may dismiss workers from employment after due inquiry when the employee has breached the duty of fidelity for example, if the employee commits sexual harassment or assault against the co-worker or immorality at the workplace. The worker who is found guilty would be deemed to have committed gross misconduct and necessary disciplinary action may be taken against him, including dismissal from employment.

(c) Employer's duty to provide safe and conducive working environment

Just as the employee is under a duty of fidelity, so is the employer under various implied duties. The common law courts have been subscribing to the social conditions prevalent in the society to promote among others, the duty on the employer to treat its workers fairly and reasonably in employment and at the time of the dismissal. Furthermore, it is also implied from this term that the employee would be treated in such a manner as to enable him or her to retain his or her dignity and status.

In Woods v WM Car Services Ltd, Lord Denning MR stated that "just as a servant must be good and faithful, so an employer must be good and considerate. Just as in the old days, an employee could be guilty of misconduct justifying his dismissal, so in modern times, an employer can be guilty of misconduct justifying the employee in leaving at once without notice".

The common law courts have recognised that an employer owes a duty to provide a reasonably safe system of work and to take reasonable care of his employees. Reasonable safety and care demand that the employer or those to whom power is delegated for running the organisation, must ensure that employees are not subject to loss of dignity, self-respect and esteem, harassment whether sexual or otherwise perpetrated by superiors, peers or subordinates. They should take necessary measures to protect workers from victimisation and harassment.

The employer may be in breach of duty of care when he knows that acts are being done by his employees during their employment, and that these acts cause physical or mental harm to a particular fellow employee, but he does nothing to supervise or prevent such acts. The employer may also be in breach of that duty if he can foresee that such acts may happen and if they do, that physical or mental harm may be caused to an individual. Where an employer knows or ought to know that harassment is taking place and fails to take reasonable steps to prevent it, it constitutes "repudiatory" conduct on the part of the employer, enabling the victim to consider himself/herself constructively dismissed.

In Waters v Commissioner of Police of the Metropolis, Lord Hutton stated that:

"A person employed under an ordinary contract of employment can have a valid cause of action in negligence against her employer if the employer fails to protect her against victimisation and harassment which causes physical or psychiatric injury. This duty arises both under the contract of employment and under the common law principles of negligence, although an employer will not be liable unless he knows or ought to know that the harassment is taking place and fails to take reasonable steps to prevent it".

Therefore, where an employee complains that he has been sexual harassed by
another employee, the employer is obliged to investigate such a complaint and take necessary action against the perpetrator. In Melewar Corporation Bhd. v Abu Osman n28 the Industrial Court noted that when an employer who had received credible information or complaints that one of its employees was engaged in sexual harassment of another of his employees, he had a duty to inquire into the allegations of misconduct. If, pursuant to a due inquiry, the allegation of sexual harassment is proven, the employer has the duty to act firmly against the errant employee. The Court stated:

"In law, an employer owes a contractual obligation to his employees, female or otherwise to ensure that he provides a safe and conducive working environment in which they can function. In the context of the problem of sexual harassment in the workplace, it cannot be emphasised strongly enough that the employer would be in breach of a fundamental and essential term of the contracts of employment existing between the employer and his employees, if he failed to take steps to put a stop to acts of sexual harassment which had been duly brought to his attention. Such a breach would indeed be a basis for the employees who have been sexually harassed to down tools and leave their jobs. They would then have had the right to deem that the employer had, by his repudiatory breach, constructively dismissed them from their employment. In such circumstances, it would be the employees who had been sexually harassed who are entitled to call in aid the doctrine of constructive dismissal and to seek their remedies in law".

As from the above, where an employer fails and/or refuses to take appropriate action on a complaint of a victim or to impose appropriate punishment on the assailant, it will constitute "repudiatory" conduct on the part of the employer. In the same vein, where an employee has been pressured or coerced to resign, for example, where the employer forces an employee to hand in a letter of resignation, such action of the employer breaches the essential implied term of trust and confidence. In the above situations, the employee may resign immediately and claim that the employer has constructively dismissed him. In Western Excavation (ECC) Ltd v Sharp n29, Lord Denning MR stated:

"An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is in significant breach going to the root of the contract of employment: or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged".

As from the above, there are essentially four conditions which have to be met in order for any employee to be able to claim constructive dismissal. The Industrial Court in the case of Secure Guards Sdn Bhd v Her Bhajan Kaur n30 set out the conditions to be met before an employee can successfully claim that he/she had been constructively dismissed, namely:

i. There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach;

ii. That breach must be sufficiently important to justify the employee resigning;
iii. He must leave in response to the breach and not for some other, unconnected reason; and

iv. He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

It is also worth noting that an employee who considers himself as having been constructively dismissed, is obliged to first inform the employer that he has been constructively dismissed, before he can make representation under s 20(1) of the Industrial Relations Act 1967 n31. Where the representation is made in contrary to the above, the dismissal would in law, be premature and the Industrial Court would not be seized with jurisdiction to hear the claim of dismissal.

Where the dismissal is referred to the Industrial Court under s 20(3) of the Industrial Relations Act 1967, the Court will enquire whether there was a dismissal and if so, whether it was done with or without just cause or excuse n32. The onus of proving constructive dismissal lies on the claimant on the balance of probabilities. After a careful deliberation of the evidence of the employer and the workman, the Court will rule on whether the dismissal was with or without just cause or excuse.

When the dismissal is held to be without just cause or excuse, the Court will turn its attention to consideration of the remedies, which shall bind the parties to the dispute. The primary remedy under the Act is reinstatement with back wages. However, where reinstatement would not be an appropriate remedy, the Industrial Court has the power to award monetary compensation which is divided into two; firstly, there is the usual award for the arrears of wages, known as back wages or back pay, which is to compensate the workman for lost benefits, which he might reasonably have expected to have had but for the dismissal, and secondly, compensation in lieu of reinstatement which is to compensate the workman for the loss of employment.

The writer is of the view that since the reputation of a person is protected in the Federal Constitution, vide Art 5(1) n33, violation of this right should allow the claimant to receive non-pecuniary compensation. Section 30(6) of the Industrial Relations Act, 1967 has conferred the Industrial Court a certain degree of flexibility in that, in making an award the court may include any matter or thing which it thinks necessary or expedient for the purpose of settling the reference under s.20(3) of the Act. The key words to be noted from the above provision is that the 'Court shall not be restricted' and 'may include in the award any matter or thing which it thinks necessary or expedient'. For example, in Pelabuhan Tanjung Pelepas Sdn. Bhd. v Thangasamy Brown DN Gnanayutham n34, the Industrial Court awarded the claimant among others, non-pecuniary losses arising from the manner of the dismissal. In the above case, the claimant who had been subject to deplorable acts of victimisation while in employment, and who had contributed much to the company during the short stint of his tenure before being constructively dismissed, was awarded exemplary compensation, an equivalent of three months remuneration.

6. Evidence to substantiate allegations of sexual harassment

An allegation of sexual harassment, if established, can cause enormous embarrassment and damage on the social status of the perpetrator. Therefore, there must be sufficient evidence to support the allegation. Evidence is of
prime importance in assisting the court to seek the truth. Unlike in criminal cases where the standard of proof required is beyond reasonable doubt, in sexual harassment cases the standard of proof on the claimant is on a balance of probabilities. The onus shall always be on the complainant to prove, on balance of probability, that such acts were committed by the assailant by relying on her own evidence and other witnesses and documents. Section 134 of the Evidence Act lays down: 'No particular number of witnesses shall in any case be required for the proof of any fact'.

In Sitt Tatt Bhd v Flora Gnanapragasam n35 the claimant, considered herself constructively dismissed when her complaint to the higher management of the company of several incidents of sexual harassment and annoyance, went unheeded. The Industrial Court held among others, that the burden imposed on the claimant to prove the allegation is not as heavy and onerous as that required in a criminal trial on sexual offences such as rape or attempted rape or other forms of sexual assault that require independent corroboration. Corroborative evidence is confirmatory proof of some fact on which other evidence has been given n36.

If the evidence of the complainant had been riddled with inconsistencies and contradictions, it would not be prudent to rely solely on her evidence unless it is corroborated. In Jennico Associates Sdn Bhd v Lilian Therera De Costa and Anor, n37 the High Court noted the evidence of a complaint in a sexual case is quite similar to that of an accomplice. While it would not be unlawful to convict merely on the evidence of an accomplice, it is imperative for the court to warn itself of the dangers of convicting the accused person merely on the uncorroborated evidence of the accomplice. It was further stated that if the court were to convict on the uncorroborated evidence of an accomplice, it must give reasonable grounds as to why it was safe in such circumstances to do so. "The same principle should apply in the case of the uncorroborated evidence of a complaint in a sexual offence" n38.

In the above case, the claimant was forced to quit her job in February 1994 "after resisting the advances" of Major Zulkifli, the managing director, the applicant in this appeal case who was also a part owner of the Mint Hotel that was under construction in Kuala Lumpur. The harassment began in December 1993, when the claimant went to his room to wish him a Happy New Year. According to the claimant, she extended her hand to greet him Happy New Year. He pulled her hand and gave her a kiss on the lips. He further pulled her towards him. The claimant objected to the treatment, and the applicant promised not to do it again. She only informed her friend of the incident the next day but kept it away from her officemates and her husband for fear of embarrassment.

A second incident occurred on 7 February 1994, when after a meeting, after office hours, the claimant was called into his office and there the applicant put his arms around the claimant's waist and molested her from behind. The offence was committed in the absence of any other persons. She resisted the molestation and thereafter immediately left the office premises. She did not lodge any police report nor did she inform her husband of the incident although she was advised to do so by her friend. The claimant did not return to work for two weeks, and when she returned, the applicant verbally harassed and criticised her job performance and thereafter asked her to resign. The claimant considered herself constructively dismissed following the above two incidents of sexual harassment. The Industrial Court found in favour of the claimant and held that
the credibility of the allegations had not been lessened by the fact that she did not go into theatrics, or lodge a police report or tell her husband or colleagues of the sexual harassment.

Unfortunately, what many deemed as a landmark victory in the battle against sexual harassment was quashed by the High Court in a judicial review application on the ground that the claimant's evidence of the allegations were not adequately corroborated. This was because the credibility of the testimony of the claimant had been proven to be seriously unreliable due to the presence of numerous inconsistencies and contradictions in her evidence. Firstly, the claimant did not lodge any police report against the acts of sexual harassment, secondly, she did not inform her husband about this incident until after her letter of resignation. Her reason for not immediately informing her husband was that she was afraid that he might do something out of anger. The High Court stated that "Normally, faced with such incident, one would at first opportunity communicate with one's husband, either personally or through phone and would also lodge a police report. These are acts consistent with truth. Not informing one's husband or failure to inform the actual incident to him are acts which can give rise to a lot of suspicion" n39.

Further to the above, there was serious inconsistency in her evidence. When the claimant was cross-examined as to her whereabouts on the night of the second incident, she told the court that she was at home the whole night and denied partying away at the Ming Court Hotel. However, she eventually had to admit having gone out and being at the vicinity of the Hotel car part on the night in question, when the counsel for the applicant produced a police report lodged by her on the night in question regarding a fight between her brother and a group of men from the Ming Court Hotel.

All this, in the view of the Court, automatically triggered off the need to have her evidence corroborated. The Court further added that even in assuming that there was sufficient evidence to support the allegations on the testimony of the claimant, it would be the duty of the Industrial Court to warn itself of the danger of making a finding on the uncorroborated evidence of the claimant and must furnish reasons for doing so. This, the Industrial Court had failed to do, hence, committed a serious error of law.

As from the above case, it is noted that the core issue involving sexual harassment, is proving the allegation. It would be worse for the victim if the accused turns the situation around. Exposing the aggressor's wrongdoing may inevitably expose the victim to some degree of unpleasantness from their senior male employees or fellow workers. Be that as it may, the court would normally look for additional evidence of relevant circumstances which may render it probable that the allegations of the complainant is true and that it is reasonably safe to act upon it.

To make the case on sexual harassment more convincing, various factors would have to be considered, for example, whether the victim made a police report or lodged a complaint with the superior, eye witnesses of the victim's reaction right after the incident, immediately relating the experience verbally or in written form to more than one person, among others, on a case to case basis. However, keeping quiet and acting normally may sometimes be construed as consenting to the advances made by the sexual harasser. In reality however, many sexual harassment cases are never reported because of the embarrassment, fear of ill treatment, and risk of losing opportunities for career advancement, among
others.

7. The Islamic Approach

It would be worthwhile examining the subject from the Islamic perspective. Human beings, man and woman have equal rights and obligations. Women are allowed to engage in lawful employment provided that they should maintain the Shari'ah instruction - preserve modesty. Women's right in engaging in lawful employment is based on the verse in the Quran, Al Nisa (chapter 4): verse 32. "To men is allotted what they earn and to women what they earn: But ask Allah of His bounty. For Allah hath full knowledge of all things". Furthermore, during the time of Prophet Muhammad (p.b.u.h) many women used to work to support one's own self and their family and this was not objected to by the Prophet (p.b.u.h).

As Allah's vicegerent on earth, man has been created to a position of honour above the brute creation. It is noted in the Quran, Surah Al Isra (chapter 17): verse 70 "We have honoured the sons of Adam". Islam strongly upholds the honour and dignity of another person irrespective of their religious faith. Muslims must exhort and commend each other to do good and forbid all that is wrong. Enjoining one another into the doing of righteousness and forbidding wrongs, should be in harmony with what Allah loves and hates. Allah (s.w.a) has revealed to human nature the consciousness and the cognition of good and evil.

Furthermore, Muslims are required to maintain and practice all the noble qualities of ethical values such as honesty, sincerity and benevolence, among others. They are also required to project an appropriate image in terms of attitude, behaviour, manner and so on. Dignity, restraint, politeness and amicability have always been regarded as virtues as opposed to snobbery, arrogance and discourteousness, which have never been recognised as good moral values in Islam.

The Quran and the Sunnah of the Prophet (p.b.u.h) repeatedly warns against violating human dignity and honour. The Quran states that "O ye who believe! Let not some men among you laugh at others - it may be that the latter are better than the former; nor let some women laugh at others - it may be that the latter are better than the former". From the above, love for other members and respect of their right, concern for their welfare and reputation are the commandments of Allah (s.w.a). In another verse, Allah (s.w.a) says "And defame not one another behind your backs. Does any one of you like to eat the flesh of his dead brother? Surely you would abhor it". Again, Allah (s.w.a) says, "Avoid aggression, for Allah loves not the aggressors". The use of abusive language or strong words of condemnation is equally prohibited. Surah Al Nisa (chapter 4): verse 148, provides "Allah loveth not that evil should be noised abroad in public speech, except where injustice hath been done; for Allah is He who heareth and knoweth all things".

The Prophet further stated that: "Whoever saved the honour of his brother, God will save his countenance against the blaze of fire in the Day of Judgment". Again, "it is not for a believer to indulge in insults, sarcasm or cursing". In a related Hadith, Prophet Muhammad (p.b.u.h) was quoted as saying: "Do not harm your fellow Muslims, do not impute evil to them, and do not try to uncover their nakedness. For behold, if anyone tries to uncover the nakedness of his Muslim brother, God will uncover his own nakedness".

As from the above, Islam safeguards the sanctity of individual rights.
Further to the above, Islam also prohibits fornication and adultery (zina) as the Quran in Chapter 17: verse 32 provides, "And do not come near zina; indeed it is an abomination and evil way". In relation to this, Yusuf al-Qaradawi stated that "when Islam prohibits something, it closes all the avenues of approach to it. This is achieved by prohibiting every step and every means leading to the haram. Accordingly, whatever excites passions, opens ways for illicit sexual relations between a man and a woman, and promotes indecency and obscenity, is haram" n47. Similarly, lustfully looking at a member of the opposite sex with desire is also prohibited because it agitates the mind and disturbs thoughts. The Prophet (s.w.a) stated "The eyes also commits zina, and their zina is the lustful look" n48.

Apart from that, Allah (s.w.a) specifically commands the believing men and women alike to lower their gaze. The Quran in Chapter 24: verse 30-31 provides, "Tell the believing men that they should lower their gazes and guard their sexual organs; that is purer for them. Indeed, Allah is well-acquainted with what they do. And tell the believing women that they should lower their gazes and guard their sexual organs, and not display their adornment, except that which is apparent of it; and they should draw their head-coverings over their bosoms, and not display their adornment except to their husbands or their fathers or their husbands' fathers, or their sons or their husbands' sons, or their brothers or their brothers' sons or their sisters' sons, or their women, or those whom their right hands possess, or male servants who lack sexual desire, and children who are not aware of women's nakedness; and that they should not strike their feet in order to make known what they hide of their adornment". Referring to the above verse, Yusuf al-Qaradawi noted that "what is haram to look at is also of course haram to touch with the hands or with any other parts of the body" n49.

As from the foregoing discussion, Islam prohibits all forms of sexual advancement, not only in the workplace but also between relationship other than husband and wife which is seen to be a sacred and beautiful relationship. Therefore, in Islam the preferred way from the verse above, is for men and women to dress and behave decently and avoid flirtatious attitudes when among colleagues and friends, to avoid any form of desire from the opposite sex that can lead to undesired acts such as sexual harassment. These are the avenues that Islam has warned against. This are the steps leading to what is prohibited in Islam, as it excites passion and opens the way for illicit sexual relations, the result of which can be the breaking up of families, bitterness in relationship, the spread of venereal diseases and the general laxity in moral and in some extreme cases, confusion of lineage and child abuse. This is the wisdom behind the divine command of the above verse.

In the context of employment relationship, an employer owes a duty to protect the workers dignity and honour, among others. An employer who fails to treat workers with an appropriate degree of dignity, thereby causing anxiety, humiliation or injury to feeling, will be answerable for all actions on the Day of Judgment. It is the individual belief, his God consciousness and piety that makes a believer refrain from what displeases God and does what pleases Him n50. Allah (s.w.a) says in the Quran that He would judge human beings not by what they possess, but on the basis of their belief and righteous conduct. For example, in Surah Al Baqarah (chapter 2): verse 62 "Any who believes in God and the last Day, and works righteousness, shall have their reward with their Lord; on them shall be no fear, nor shall they grieve".
8. Conclusion

Sexual harassment is a form of misconduct and should be handled as a disciplinary matter. Any form of solicitation of sexual favour for increment, promotion, favourable treatment, training, appointment or other repulsive behaviour of the employer or the co-workers is unacceptable to employees, and is repugnant to social standards. The Code prohibits all form of sexual harassment in the workplace. Apart from regulating morality or personal lives of employees, the Code is intended to safeguard the sanctity of its individual rights for protection against unwelcome, unsolicited or unwanted sexual advances and thereby ensuring their privacy and decency. Where a complaint of sexual harassment is raised to an employer, they must take effective measures to ensure that all complaints are handled seriously and quickly, while protecting the confidentiality of the victim. Disciplinary rules should set out the penalties for which the harasser will be liable, if found guilty of the offence.

The Code was basically drawn up to guide employers and it has no force of law to be deterrent. At present, the Joint Action Group Against Violation Against Women and the Malaysian Trades Union Congress is pressing for a comprehensive bill on sexual harassment. It has proposed among others, the setting up of a sexual harassment committee comprising of management, employee of equal gender representation to accept, investigate and resolve complaints where possible. It has further proposed the establishment of a tribunal comprising persons of legal and relevant expertise to conduct inquiries with as little formality as possible. On the other hand, the Malaysian Employers Federation is of the view that the best approach to prevent sexual harassment in the workplace is through the establishment of preventive mechanism at the company level and not legislation n51. The writer is of the view that the Legislature must seriously consider enacting a comprehensive law on sexual harassment because such legislation will have a positive effect in stamping out sexual advancement in the workplace and ensuring a safe and healthy working environment.

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FOOTNOTES:

n1 Excerpts from the keynote address of Y.B. Dato' Lim Ah Lek, the then Minister of Human Resources, Malaysia at the official opening of the National Workshop on Sexual Harassment in the Workplace on 1 March 1999 at Kuala Lumpur.


n6 See Lam Soon (M) Bhd. v Cik Chong Siew Yuan [1986] 1 ILR 1425; Walter Wright Mammoet (Malaysia) Sdn. Bhd. v Lee Kok Swan [2000] 1 ILR 404, where it was held that asking a female employee to sleep with the company's senior staff is sexual harassment.
n7  [1998] 3 CLJ 583 (HC); [1996] 2 ILR 1765 (IC).

n8  See Alan Fox, Beyond Contract: Work, Power and Trust Relations (London: Faber and Faber Ltd. 1974) at 183 where it was stated; "Since no employment contract could anticipate all relevant contingency arising in work relations, many issues had to be settled during the everyday conduct of business. How hard was the employee to work? Under what material, social, and psychological conditions? With what tools, machines, and materials? With what framework of rules, discipline and sanctions? With what rights to demur against specific instructions, managerial policies and proposal of change? These constituted the reality of life under an employment contract. But who was to settle them? How were the empty boxes of the contract clauses to be given the necessary content? The damaging implication of pure contract doctrine for the employer would have been that it could not allow him to be the sole judge of whether his rules were arbitrary or exceeded the scope of his authority". Whether to imply a term in the contract of employment is a question of law. See O'Brien v Associated Fire Alarms Ltd [1969] 1 All ER 93.

n9  See Liverpool City Council v Irwin [1977] AC 239, 266. For example, the implied term of trust and confidence which is regarded as essential in the contemporary modern world is not merely based on the implied intention of the parties, but is a legal incident of the relationship which is attached by law itself. See Mears v Sofecar Security Ltd. [1982] ICR 626, 651.

n10 In Howman and Son v Blyth [1983] IRLR 139, 141, Browne-Wilkinson J stated; "...[I]mplied terms may be of two types. The first ... are terms which the parties, if they had been asked at the time of contract whether the term was part of the contract, would have immediately agreed that it was. The second type...applies to cases, such as contracts of employment, where the relationship between the parties requires that there should be some agreed term which has not in fact been agreed but both parties would not have agreed what that term would be if they had been asked". For example the implied duty of fidelity, implied term of trust and confidence, the implied duty to provide reasonable notice to end the employment relationship, among others, are implied question of law.

n11 See Reigate v Union Manufacturing Co. (Ramsbottom) Ltd [1918] 1 KB 592 at p 602, a case dealing with agents commissions; and this principles extends to contract of employment, where Scrutton LJ stated; "The first thing is to see what the parties have expressed in the contract; and than an implied term is not to be added because the court thinks it would have been reasonable to have it inserted in the contract. A term can only be implied if it is necessary in the business sense to give efficacy of the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated, someone had said to the parties, "what will happen in such a case" they would both have replied "of course, so and so will happen; we did not trouble to say that; it is too clear". Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed". See also Shirlaw v Southern Foundries Ltd [1939] 2 KB 206 at p 227.

n12 See The Moorcock [1889] 14 PD 64 at 68. In BP Refinery (Westernport) Pty Ltd. v Shire of Hastings [1977] 16 ALR 363; 52 ALJR 20 at 26 the Judicial Committee of the Privy Council stated; "Their lordship do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express in their view, for a
term to be implied, the following conditions (which may overlap) must be satisfied, (i) it must be reasonable and equitable (ii) it must be necessary to
give business efficacy to the contract, so that no term will be implied if the
contract is effective without it, (iii) it must be so obvious that "it goes
without saying" (iv) it must be capable of clear expression (v) it must not
contradict any express term of the contract.

n13 See London Export Corp. Ltd. v Jubilee Coffee Roasting Co.Ltd. [1958] 2
All ER 411, 417-8; Vorvis v Insurance Corporation of British Columbia [1989] 58
DLR (4th) 193, 200 (SCC). However, it is submitted that an express term may be
negated by an implied term where justice demands it. For example in Johnston v
Bloomsbury Health Authority [1991] ICR 269 (CA), an express term entitled the
defendant to compel an employee a senior house officer, to work overtime. The
express term required him to work for 40 hours and in addition available on call
up to an average of 48 hours. As a result of working excessive hours with lack
of sleep, he felt sick, as it was too arduous for him. An application for
declaration that the employer should not compel the plaintiff to work exceeding
72 hours a week was declined because the express term 'available on call', the
defendant did not impose absolute duty on him to work extra hours instead gave
the defendant the right, subject to an ordinary duty of care not to injure the
plaintiff. The majority however, expressed the view that the express term did
not preclude the implication of a term that would put the defendant in breach if
it asked the plaintiff to work such hours on call as it is foreseeable would
result in ill health.

n14 [1891] 2 QB 488 (CA).

n15 Ibid, at p 491.

n16 [1893] 1 Ch 218, 229, Bowen L.J. observed that "What is an implied
contract or an implied promise in law? It is that promise which the law implies
and authorised us to infer in order to give the transaction that effect which
the parties must have intended it to have, and without which it would be
futile".

n17 See for example Wessex Dairies Ltd. v Smith [1935] 2 KB 80, 85 (CA).

n18 [1957] AC 555

n19 Wilson J (dissenting) in Vorvis case used the term 'civilised
behaviour'. It was stated that "the very closeness engendered by some
contractual relationship, particularly employer/employee relationship in which
there is frequently a marked disparity of power between the parties, seems to me
to give added point to the duty of civilised behaviour" (supra) at note 12, at p
224).

n20 See Malik v Bank of Credit and Commerce International S.A. (in
Liquidation) and Mahmud v Bank of Credit and Commerce International S.A. (in
Liquidation) [1997] 3 All ER 1 HL.

[1982] ICR 693 CA. See also Bliss v South East Thames Regional Health Authority
[1987] ICR 700, 714; Imperial Group Pension Trust Ltd v Imperial Tobacco Co.
Ltd. [1991] 2 All ER 597, 606.

See for example Gelau Anak Paeng v Lim Phek San and Ors. [1986] 1 MLJ 271.

See for example Waters v Commissioner of Police of the Metropolis [2000] IRLR 720 HL.

Supra at note 2.


Ibid, at p 724.


See Southern Bank Bhd. v Ng Kang Lian and Anor [2002] 5 MLJ 553 HC.


In Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang and Anor v Utra Badi K Perumal [2000] 3 MLJ 281, 294 CA, Gopal Sri Ram JCA stated that "The authorities are now well settled that the punishment of dismissal deprives a person of his livelihood and therefore of his "life" within the meaning of that expression in Art 5(1) of the Federal Constitution ... . Similarly, when a person is deprived of his reputation, it would in my judgment, amount to a deprivation of "life" within Art 5(1) of the Federal Constitution. The right to reputation is part and parcel of human dignity. And it is the fundamental right of every person within the shores of Malaysia to live with common human dignity ... ."


In R v. Baskerville [1916] 2 KB 658, Lord Reading said that to amount to corroboration evidence must come from independent evidence which connects the accused with the crime. It must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the accused committed it.

[1998] 3 CLJ 583 (HC); re'v [1996] 2 ILR 1765 (IC).

Ibid. at p 590.

Ibid. at p 592.

See for example Surah Ali Imran (chapter 3): verse 110 "Ye are the best of peoples, evolved for mankind, enjoining what is right, forbidding what is wrong, and believing in Allah". (Abdullah Yusuf Ali The Meaning of the Holy Qur'an Maryland, Amana Corp. 1989). Again in Surah Al Tawbah (chapter 9): verse 71 "The believers, men and women, are protectors, one of another: they enjoin what is just, and forbid what is evil. They observe regular prayers, practice regular charity, and obey Allah and His Messenger". See also Surah Al Hajj
(chapter 22): verse 41.

n41 See for example Surah As-Sham (chapter 91): verse 8.

n42 See Surah Al Hujurat (chapter 49): verses 11-12.

n43 See Surah Al Baqarah (chapter 2): verse 190.


n45 Al Tabrizi "Mishkat" Vol 1 Hadith No 4847.

n46 Tirmidhi, Sunan III, 255.


n48 Abu Daud and Al-Tirmidhi cited from Yusuf al-Qaradawi, ibid. at p 153.

n49 Yusuf al-Qaradawi, ibid. at p 154.

n50 Whatever man does in this life he cannot escape from the fact that one day he will die and be compelled to account for what has passed. On that day, there will be no advocating, no favour, no impartiality, fraud and deception, and justice will be done. In the last Sermon Prophet Muhammad (p.b.u.h.) reminded the Muslims by stating "Remember one day you will meet Allah and answer your deeds. So beware do not astray from the path of righteousness after I am gone".