WEP Warwick Evans Publishing

Transactions on Social Science, Education and Humanities Research
ISSN: 2960-1770, eISSN: 2960-2262 | Volume 12
LHPPR 2024

The Legislative Approach to Employer Liability in Workplace Sexual Harassment Within the PRC Legal Framework: Taking American as a Counterpart

Chiyu Fan*

College of Foreign Languages, Peking University, Beijing, China

* Corresponding Author: 2100019308@stu.pku.edu.cn

Abstract. Workplace sexual harassment is a prominent issue across the globe, despite a late start, China has made huge progress in legislation in recent years. However, China's personality approach is insufficient in both legislation and judicial practice, especially the underemphasis on employer's liability. Some studies are addressing this issue, but the cause of this problem remains understudied. Thus this article attempts to fill in the missing parts of the discussion. Firstly by reviewing the legislative progress, this article emphasizes the interplay between domestic values and international legislative influences. Then discusses the practical challenges in judicial practice, including the underemphasis on employer liability and the need for clearer guidelines on accountability. By re-examining the collective movement and women's liberation movement after 1949, This article argues that the avoidance of addressing sexual harassment in the public sphere and the neglect of employer responsibility are deeply rooted in our history. Then by comparing the social movement and legislative approach with the U.S., this paper argues that: (i) adopting the sex discrimination model and (ii) encouraging community engagement by forming a bottom-to-top movement would be beneficial to future legislation and judicial practices concerning workplace sexual harassment. Mass culture and societal currents are crucial for China to emphasize the employer's liability both in legislation and judicial practice.

Keywords: Workplace; Sexual harassment; Employer's liability.

1. Introduction

Addressing workplace sexual harassment is crucial for fostering a safe and inclusive work environment, which is essential for the well-being of employees and the productivity of organizations. It also reflects a society's commitment to upholding the dignity and rights of all individuals, regardless of gender. While there has been a growing body of research on sexual harassment, particularly in Western contexts, the Chinese experience remains under-explored. The integration of international frameworks and models into Chinese legislation has been noted, but their practical application and effectiveness in the Chinese context require further examination. Despite the legislative advancements, there is a gap in understanding how these laws are applied in judicial practice, especially regarding the role and responsibility of employers in preventing and addressing sexual harassment. This study aims to fill this gap by examining the legislative progress of workplace sexual harassment in China, analyzing the interplay between domestic values and international influences, and assessing the practical challenges in enforcement. The article synthesizes information from legal documents, scholarly articles, and case analyses to trace the evolution of Chinese legislation on sexual harassment. It also evaluates the impact of these laws on judicial practice and the perception of employer liability. The objective is to provide a comprehensive overview of the current state of workplace sexual harassment legislation in China, identify areas for improvement to emphasis employer's liability, and offer recommendations for enhancing the legal framework and societal understanding to more effectively combat this issue.

2. China's Legislation on Workplace Sexual Harassment

2.1. Review of the Legislative Progress

China's legislation on workplace sexual harassment has been through a relatively late development. However, through the legislative progress, we can see the interaction between domestic values and the influence of foreign legislation. It is hard to find out the exact time when sexual harassment became a public concern, but the phenomenon of sexual harassment was revealed in a domestic sociology survey: "Sexual harassment, which plagues women in many countries around the world, also exists in China" [1]. This survey points out that workplace sexual harassment has become a concerning social issue, and it's highly related to women's practicing background. To be precise, China's socioeconomic transformation has resulted in lacking of administrative protection for employees' rights. Accompanied by inadequate social monitoring, workplace sexual harassment has become an issue with structural social reasons. Before 2000, most of the papers perceived sexual harassment on a broader scale, without realizing that it's an issue highly related to women's social identity. But Also at this time, legal scholars have pointed out that sexual rights are an important element of women's personality rights, which means "women has the right to freely choose their sexual partners to the extent permitted by law and morality" [2]. Between 1995-2005, the gender discrimination model was introduced to China, some scholars believed that workplace sexual harassment originates from gender discrimination and is harmful to women's well-being at the workplace, While others believed that workplace sexual harassment is an abuse of power, the "power" behind sexual harassment comes from the culture and psychology of the society, not just the position. From the perspective of power, the subject of sexual harassment is no longer the two sexes, but "the relatively strong and the relatively weak" [3]. After 2005, some scholars have criticized the anti-sexual discrimination model of the US for the definition is too narrow and doesn't necessarily conform to China's social condition [4]. While other scholars introduced the employee dignity represented by the European Union. In 2014, some scholars attempted to summarize different theoretical paradigms against sexual harassment. Above these, the most important theories are the Equality Theory, Autonomy Theory, and Dignity Theory. In practice, victims either use the anti-discrimination model under the Equality Paradigm to seek financial compensation or use the Dignity Paradigm to seek moral compensation. The Autonomy Paradigm, as a culturally critical theory, is relatively difficult in terms of legal remedies [5]. In 2020, Civil Code was promulgated, in which anti-sexual harassment provisions were placed in the chapter on "Rights to Life, Rights to Corporeal Integrity, and Rights to Health", indicating that China's regulation on sexual harassment adopts the legislative path of safeguarding the victim's personality rights.

The social trends about sexual harassment in China since the 1990s can be perceived as guiding cues of legislation. The first law on sexual harassment was passed by the Standing Committee of the National People's Government in 2005. Article 40 of the Law of the People's Republic of China on the Protection of the Rights and Interests of Women: "Sexual harassment against women is banned. The victims shall be entitled to complain to the entity or the relevant organs." Since then, sexual harassment had its definition in China's legal system, which is a giant step for society to comprehend the unlawfulness of this behavior. However, this article still lacks practicality, without clearly defining the elements and consequences of sexual harassment. In 2012, Special Rules on the Labor Protection of Female Employees were endorsed by the State Council. Article 11 states that "Article 11 Employers shall prevent and prohibit the sexual harassment of female employees in their workplaces." This article has the significant importance of stipulating that employers are the obligation barer to prevent sexual harassment in the workplace. workplace sexual harassment was no longer a simple tort, but a complicated issue associated with workers' dignity and gender bias. Employers have a legal obligation to provide a safe working environment. The most important law, Civil Code came out in 2020. Article 1010 of the Civil Code defines sexual harassment as behavior through oral words, written language, images, or physical acts that are against others' will. Meanwhile, the person harassed has the right to request the harasser to bear civil liability. This forms the basis for the victim's exercise of the right to request personality rights. Moreover, "The State organs,

enterprises, schools, and other organizations" shall take reasonable measures to prevent sexual harassment and deal with it afterward. However, the Civil Code doesn't offer clear guidance on what kind of responsibility (whether they should bear civil liability, and how to establish principles of attribution) the employers should bear, and whether the employers should be punished if they obey the rules. On the other hand, by following the personality model, Article 1010 applies to all genders but doesn't emphasize the comparatively vulnerable group: women. This can lead to neglecting groups most in need of protection in judicial practice. It indeed mentions the places where sexual harassment can happen: state organs, enterprises, schools, and other organizations, but the vague definition fails to emphasize the workplace, thus blinding people to the importance of employers' liability. The 2022 revision of the Law of the People's Republic of China on the Protection of Women's Rights and Interests went further on employers' responsibility. Article 25 stipulates the measures the employers should take, including formulating rules, conducting education on sexual harassment, establishing investigation procedures, and so on. Though with specified obligations, without rules on punishment the employers if they fail to fulfill the obligations, these rule seem to go in vain in practice.

2.2. The Current State of Judicial Practice and Existing Issues

It's very important to acknowledge the improvements of current legislation. Before 2018, sexual harassment faced the difficulty that it was hard to fit into a specific type of tort liability. At that time causes of action were most disputes related to the right to health, bodily integrity, or reputation [3]. On December 12, 2018, The Supreme People's Court issued a document designating "sexual harassment injury liability disputes" as an independent cause of action in civil cases. In the same year, Liuli, who had been inspired by the "Me Too" movement filed a lawsuit against a man who used force to hug her in the workplace. The court decided that the man should apologize to Liu in writing or verbally. However, there was no financial compensation and the harasser's company got away with it. It was the first case, and the first winning case filed in the cause of "sexual harassment injury liability disputes"[6]. However, it's typical in the way that it's easy to neglect employers' liability in judicial practice. After 2022 the Civil Code came out, there were more cases registered in the cause of sexual harassment injury liability disputes, among them, most are guiding cases issued by the court [7]. However, studying 144 cases since 2002 on the China Judgement Online website, a great number of cases are still about labor contract disputes, where most cases are often the result of labor disputes in which the employer dismisses the perpetrator of sexual harassment, then the perpetrator sues the employer for economic compensation [8]. When it comes to lawsuits directly against the perpetrator, the best-case scenario is the court orders the perpetrator to provide financial compensation [7]. Nonetheless, the employers are absent in these court decisions. It can be deduced that when filing a lawsuit, the victims usually only seek the harasser's liability, not the company's. Meanwhile, the court also has no legal basis on what kind of responsibilities the employers should bear and what is the proper punishment. The seemingly comprehensive law is like a shelter without a window, without clarifying the punishment if the employer fails to fulfill their responsibility, the wind can still blow in. We can also learn that the social perception of workplace sexual harassment is not inadequate. Most victims would only sue the harasser and leave the employer alone. Few people truly realize that workplace sexual harassment is a form of sex discrimination, and the employer has the responsibility to from a safe working environment. However, social perception and inadequate legislation have their roots in our history.

3. The Collectivization Movement and Workplace "Equality"

Compared to the US, China's legislation and social cognition on workplace sexual harassment have fallen behind. Compared to other Asian countries, the level of gender equity in China is not lagging. That is the result of China's socialist ideology and corresponding policies. Social movements focusing on gender equity are often perceived as positive and fruitful. Conversely, these movements

might be the cause of today's vague legislation and inadequate social perception of workplace sexual harassment.

Different from The US, feminist movements originated from the bottom of society and influenced policies and legislation, China's "feminist" movements were alongside the Socialist Transformation Movement, for women's liberation was an important component of liberating social productive forces. 1954-1956, there was a movement called the Corporate Mode. At that time, agricultural and industrial production was managed collectively, everyone in the household had to work collectively to earn "Gong Fen"(work credits). In the corporate mode, each individual's "Gong Fen" from labor can be converted into cash after the autumn harvest. The number of work points earned by each individual was made public so that everyone's economic contribution to the family was clear. Women had equal rights to work and the opportunity to earn "Gong Fen" to earn money. This movement brought women from households into collective production activities, and women came to realize that they were of the same importance as men economically. Women not only had to right to engage in public affairs, but their status in the family has improved as well [9]. In the Great Leap Forward period, women's roles transformed from unpaid domestic labor bearers to socialist builders [10]. But on the other side, women's liberation in China is under the arrangement of a political movement, women have become passive recipients of the movement, rather than leaders of the movement with self-consciousness. Also, their rights were embedded in their contribution to the country and collective. Thus a false image was pictured for women: "The greater the contribution of women in labor, the higher their status in society and the family" [11]. Their contribution and intelligence as individuals in the workplace were never truly acknowledged and appreciated. Moreover, in the workplace, gender equality has been translated into equal responsibility and obligations, rather than actual equality of rights [11]. The fact that women are vulnerable to sexual harassment was not left defenseless. People have been repeating the political slogan "Women lift half of the sky" for decades, admitting that women are an important force for social production, but turning a blind eye to women's unequal position in the workplace. The false "equality" has been a stumbling block for China to realize women's position in the labor sector.

From a cultural perspective, the socialist tradition and morals at that specific time emphasize the collective and disdain the individual. Sexual harassment has been categorized into the private sphere, such behavior was considered as the immorality of the perpetrators. Thus, people wouldn't seek public regulations, the only remedy was moral condemnation of the perpetrator, indicating that sexual harassment was perceived as an isolated incident rather than a systemic harm [12]. This could be the underlying reason that even nowadays some victims wouldn't want to seek public remedies, even if they do, they would only condemn the perpetrator rather than blame the employer for not providing a safe working environment. As well as we can see on the internet: many bystanders would blame the victims for bring sexual harassment into the public sphere and slut-shame the victims. True gender equality is not only manifested in the realm of production but also the respect for and protection of women's fundamental rights and special interests, which had been long neglected in our history and still need to be fully acknowledged by the public.

4. The American Approach

The American judicial practice of workplace sexual harassment was accompanied by the uprising of the second wave of women's movements. Social activists, scholars, and other forces have participated in the movement, among them the most important name is Catherine MacKinnon. MacKinnon is an attorney, scholar, and social activist, she has written on the topic of workplace sexual harassment throughout the 1970s. MacKinnon started the conceptual framework that "the sexualized treatment of women by their male employers was a form of sex discrimination based on social inequality"[13]. Furthermore, MacKinnon also defined the two forms of sexual harassment that are widely accepted today: quid pro quo harassment (An offer was made where sexual favors were proposed as a trade-off for a concrete employment advantage, such as a promotion, or to avoid a negative outcome in one's job) and hostile environment harassment (The infiltration of a workplace with content that is

demeaning or of a sexual nature, intended or resulting in the establishment of an environment that is unwelcoming, daunting, or offensive, thereby impacting the terms and conditions of employment) [13]. The legal basis for MacKinnon's theories in the USA is the Civil Rights Act of 1964. This law was enacted in the period of the civil right movement in early 1964 when the federal law tried to address the issue of discrimination against African Americans [13]. So Title VII of the Civil Rights Act in essence is an anti-discrimination statute [12]. Meanwhile, the Equal Employment Opportunity Commission (EEOC) also made efforts to apply MacKinnon's theories to investigate cases. They aligned with MacKinnon's sex discrimination model and argued that sexual harassment as a form of discrimination could violate Title VII of the Civil Rights Act [13].

Besides, the theories on workplace sexual harassment have gradually been accepted by the court. In the case of Barnes v. Costle (1977), MacKinnon's theory of quid pro quo harassment was admitted by the court. In another case, In the case of Bundy v. Jackson (1981), the court mentioned the categorization of hostile environment harassment by addressing that the idea that where an employer developed or tolerated a significantly hostile work environment, regardless of whether the complaining employees lost any real job advantages as a result of the discrimination. In 1981, the US Supreme Court finally adopted MacKinnon's framework under Title VII of the Civil Rights Act. In the case of Meritor Savings Bank v. Vinson (1986), the Supreme Court decided that the sexual intercourse is the result of a bank executive abusing his power and coercing the employee, thus meeting the elements of sexual harassment. Later in 1993, in the case of Harris v Forklift Systems, Inc. (1993), the court reckoned MacKinnon's theory by describing hostile environment sexual harassment in detail. On the other hand, scholars are still exploring the boundaries of workplace sexual harassment and discovering the unseeing inequality underneath. There are many different subtypes of sexual behavior, including gender harassment, and punishing women for doing men's work, especially in the fields occupied by men [14]. It has been found that in the military and the law, 9 out of 10 women have experienced gender harassment [15]. Scholars are calling for gender harassment should also be included in legal understandings of sex-based harassment [15].

5. Advice to Emphasize Employer's Liability

It is not hard to see the difference in workplace sexual harassment legislation in China and the US. China's perception and policy before 2022s can be considered as the result of top-to-bottom political movements with institutional inertia. The women's liberation movement since 1949 had improved women's social status but was ignorant of their special interest and mainly focused on economic development. Though the sex discrimination model was introduced in China since the 1990s, it was never accepted by the majority in daily life, not to mention in judicial practice. Thus the employer's liability had been neglected for a long time. The Civil Code can be understood as a mixture of the continental dignity model, the U.S. sex discrimination model, and China's own legislative experience. It indeed mentioned the employer's liability, but the broad scale and vague definition result in difficulty in practice to pursue accountability from the employer. On the other hand, America has been through a prevalence wave in social movement. The legislation was a bottom-to-top movement. Before being adopted by the court, theories about workplace sexual harassment were widely accepted by the public. The US approach is a result of its common law system, feminist activists, and the efforts of the victims [12]. Through this pathway, they had convinced the courts and government to acknowledge the existing while neglected issues. workplace sexual harassment is unique in the way that it's usually hidden in the unequal power structure, and it needs victims and practitioners to bring this issue into daylight. Thus it's highly related to social practice and related to common knowledge. China's development on workplace sexual harassment has been hidden under the "private sphere" for a long time and still lacks bottom-to-top consensus. Though with significant improvements in legislation, there is still more to be expected.

First of all, adapting the sex discrimination model. Gender equity is one of the key features of socialism ideology, and is written in China's constitution. Nonetheless, as mentioned above, even in the collective era, there was no gender equity, not to mention in today's China's modernized

production methods and bureaucratic hierarchy. MacKinnon's theory of sexual harassment revolves closely around the exploration of sex, particularly the gender implications of sex, and focuses on the workplace contexts, all of which are related to unequal power dynamics. Sex, work, and power thus weave together to form a comprehensive framework, a framework of sex discrimination [16]. MacKinnon refutes the viewpoint that men can also be harassed by women, so sexual harassment is not gender discrimination. She argues that men as a whole are not defined as sexual objects in the same way as women are. Women, overall, are more sensitive to and feel more harmed by sexual jokes than men, which can be understood in this context [17]. Thus in the domain of workplace, the employer has crucial importance to safeguard women's rights. The Civil Code didn't mention gender while mentioning sexual harassment, it's positive in the way that it protects both genders' rights. However, it did not highlight that women are more sensitive in this domain. This is where the law goes separate ways with the sex discrimination theory. Chinese scholars are arguing that China is applying the integration of tort and anti-discrimination models and that The Supreme Court places disputes regarding "equal employment rights" under the category of "personal rights" disputes [16]. As Mackinnon points out, the tort law model views sexual harassment as harm to individuals, but in reality, sexual harassment constitutes harm to a group [17]. The current legislation seen in the Civil Code has its own intention to protect the core value of socialism, however, the specified definition of workplace sexual harassment still needs to be modified. Only in this way, the theory basis for an employer's liability can have its ground. Sex discrimination-based legislation has its trajectory of theoretical development, except for legislation, social enforcement is also a crucial part. #Me Too movement might be the closest tide that has brought feminists across the world together. From the perspective of a community, victims made efforts to build a community by sharing traumatic experiences, aiming to speak out and change the social taboo about sexual harassment [18]. Moreover, scholars also argue that the #Me Too movement has impacted the conceptualization of organizational accountability for sexual misconduct at work, thus facilitating public demands for accountability that pressured organizations to respond [19]. More and more victims standing out to share the things they have encountered could be an effective way to form common knowledge on workplace sexual harassment. And the employers and legal authority also have to respond to escalating allegations, pushing them to categorize and come up with more effective ways to address this issue. This might be a chance for another country to form a bottom-to-top structured social consensus on sexual harassment.

6. Conclusion

The main findings of this article indicate that while China has made significant strides in addressing workplace sexual harassment through legislation, there remains a notable gap in emphasizing employer liability and in the practical application of these laws. The main reason that led to this deficiency can be detected in our history. First of all, China's collective movement emphasized women's importance in social production, while neglecting their special interest in the workplace. Moreover, at that period sexual harassment was perceived as a behavior related to personal morality, thus hindering people from bring this incident into the public sphere. As we can see in practice, most cases related to the workplace are raised as part of labor disputes. People's awareness of the severity of sexual harassment still needs to be raised. Secondly, China's women's liberation movement was a top-to-bottom political movement, thus it didn't form a joint force of society and legislators to improve the legislation related to sexual harassment. From a legislative perspective, the study concludes that China's approach to legislating against workplace sexual harassment, as reflected in the Civil Code, adopts a personality rights perspective, which is a positive development. However, the broad and vague definitions within the code make it challenging to hold employers accountable in practice. To refine the legislation, the comparison with the American approach reveals the importance of a bottom-up societal consensus and the integration of sex discrimination models in legislation. To be more specific, the legislation should specify penalties for employer negligence and emphasize the special interests of women.

The implications of this study for future research are profound. It suggests that there is a need for further refinement of the legal framework to align with international standards and to provide clearer guidelines on employer liability. Additionally, the study underscores the importance of societal awareness and the role of social movements in shaping legislation and public perception. The #Me Too movement is highlighted as a potential catalyst for change, indicating that future research should explore the impact of such movements on legal and social responses to sexual harassment.

Looking forward, the study calls for a more in-depth examination of the cultural and historical roots of workplace sexual harassment in China, as well as the development of a structured social consensus that addresses the issue comprehensively. It also suggests that future research should focus on the effectiveness of legal remedies and the role of community engagement in fostering a safer and more inclusive work environment. By doing so, China can continue to progress towards a legal and social framework that effectively combats workplace sexual harassment and upholds the dignity and rights of all individuals.

References

[1] Can Tang, The Existence of Sexual Harassment in China - A Case Study of 169 Women, Journal of Chinese Women's Studies, 2 (1995) 31-34.

[2] Mingshun Li, Correctly Understanding and Legally Protecting Women's Sexual Rights, Journal of China Women's College, 3 (1994) 33-36.

[3] Ninglan Xue, Preventing Sexual Harassment in China:Academic Discussion, Legislation and Adjudication, Journal of Chinese Women's Studies, 3 (2021) 88-102.

[4] Xuemei Wang, Examining the Definition of Sexual Harassment from a Gender Perspective, Journal of Chinese Women's Studies, 5 (2006) 12-15.

[5] Shaopeng Song, What is Sexual Harassment? Conceptual Confusion and Paradigmatic Debates: The Controversy between "Sexual Autonomy Educators" and "Feminists" around the Teachers' Day in 2014, Journal of Chinese Women's Studies, 6 (2014) 56-65.

[6] Liu v Social Worker Celebrity Sexual Harassment Rights Protection Case (2019.06.11) CLI.C.99764697 (Lawinfochina)

[7] Wang v Fu Sexual Harassment Liability Dispute Case (2023.03.01) CLI.C.503480521 (Lawinfochina)

[8] Lin v. Shanghai XYZ Logistics Company Labor Contract Dispute Case (2023.03.30) CLI.C.504196186 (Lawinfochina)

[9] Yunxiang Yan, Private Life under Socialism: Private Life under Socialism: Love, Intimacy, and Family Change in a Chinese Village, 1949-1999, first ed., Shanghai People's Publishing House, Shanghai, 2017.

[10] Yuye Kong, The "8 March Restaurant" Blossoming with Flowers of Innovation: Women and Technical Labor During the Great Leap Forward, Journal of Chinese Women's Studies, 5 (2019) 113-125.

[11] Zhiyong Zhang, The Absence of Feminism: The Paradox of Gender Equality in Rural North China During the Great Leap Forward, Jiangsu Social Sciences, 1 (2011) 232-237.

[12] Jiahui Duan, Workplace Sexual Harassment in China: A Comparative Inquiry into the Personality-Based Paradigm, The Chinese Journal of Comparative Law, 112 (2023) 1-34.

[13] Craig R. Lareau, “Because of … Sex”: the Historical Development of Workplace Sexual Harassment Law in the USA, Psychological Injury and Law, 9 (2016) 206-215.

[14] Katherine M. Franke, What's Wrong with Sexual Harassment?, Stanford Law Review, 49 (1997) 691-772.

[15] Emily A. Leskinen, Lilia M. Cortina, Dana B. Kabat, Gender harassment: broadening our understanding of sex-based harassment at work, Law and Human Behavior, 35 (2011) 25-39.

[16] Xiaofei Guo, Is Sexual Harassment Sex Discrimination?An Inquiry from the Perspective of Jurisprudence, Journal of Chinese Women's Studies, 1 (2021) 55-69.

[17] MacKinnon,C. ..Sexual Harassment of Working Women: A Case of Sex Discrimination, Yale University Press, M. New Haven, 1979.

[18] Yan Tan, Kaibin Xu, #Metoo as communities of practice: a study of Chinese victims’ digital narratives of sexual harassment, Journal of Applied Communication Research, 51 (2023) 302-319.

[19] Galina Goncharenko, The #MeToo legacy and “the Collective Us”: conceptualising accountability for sexual misconduct at work, Accounting, Auditing & Accountability Journal, 36 (2022), 1814-1838.