



CRITICAL REVIEW

Comparative analysis of law on tort of deviant behaviors in Malaysia and India

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Abstract. Deviant workplace behavior has always been an interesting topic to be observed by both academicians and practitioners. Workplace deviance is a hazard and risk in the workplace because it is a threat that needs to be addressed effectively. In Malaysia, and India there are two relevant statutory legislations in tackling human behaviour in the workplace. The purpose of this paper is to introduce the concept of deviant workplace behaviour and to investigate into the nature and forms of deviant workplace behaviour being prevalent in the organizations. Since such negative behaviours are associated with huge economic and psychological costs, organizations need to get this problem under control. The main objective here is to explore the strategies and processes to be adopted by the managers and their organizations in order to reduce, manage or prevent deviant behaviours from the workplaces. Further to recommend that relevant legislations provides remedies for the victims of such conduct.

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INTRODUCTION

Workplace deviance is broadly defined as a deliberate act of causing harm to organization and employees, Keim (1999). Thus, workplace deviance assumes many forms, such as deviance committed by employees against other employees, deviance committed by employees against the organization, deviance committed by external parties towards the organization or its employees. Deviance committed against persons in the workplace is yet another broad form of workplace deviance, which has also been an issue of particular concern. Workplace deviance has been widely cited as being rampant. Acknowledging the consequences of workplace deviance, jurisdictions across the globe have been expected to adopt legal measures to address related issues. However, it is also argued that the nature of legal response to workplace deviance is varied, and that in some cases, the legal initiatives of some

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jurisdictions has always left out a lot to desire, especially in terms of torts, Lord (1998).

In light of such assertions, one wonders what could be the position of India and Malaysia in addressing workplace deviance issues. This paper examines the tort on deviant behaviors in the case of Malaysia and India.

Nature of Deviance and Tort of Deviant Behaviors in Malaysia and India

This article considers points laid out secondary sources covering the state of deviant behaviors and torts concerning workplace in India and Malaysia. Literature search was informed by the use of key words, which were formulated to ensure that only relevant sources are obtained. The key words were devised as follows

- Malaysia/India, Torts, Workplace Violence
- Weaknesses, Workplace Torts, Malaysia/India
- Statistics, Workplace Violence, Malaysia/India

Concisely, literature on the state of deviant behaviors and rated torts in India and Malaysia point certain commonalities. The first search of literature was conducted as a component of broad review of the law of Malaysia and India touching on the applicability and nature of law regarding torts that guide the conduct of persons at the workplace settings. A supplementary study was further conducted as a way of ensuring that the material touching the subject was not misplaced. In order to locate additional unpublished information besides those traced from the web pages, the study research entailed conducting a number of parties. One of the parties is public and community legal services in Malaysia and across the world who have knowledge on torts on workplace conduct. Another party is key organizations and academics that have funded research on torts, which including those cited other documents. The analysis included analyzing the significance of the differences in observation and findings, and making an inference.

Workers Compensation Monitor assessed the effectiveness and loopholes underlying the statutory legislations. The study acknowledges that the milestones have been achieved, as evidenced by the number of cases related to workplace violence that have been tried in Malaysian and Indian courts. It is thought that India and Malaysia have made some jurisdictional milestones to address workplace deviance. Badrie (2010) acknowledges that the milestones have been achieved, as evidenced by the number of cases related to workplace violence that have been tried in the Malaysian and Indian courts.

A number of cases on deviant laws have been tried in Malaysia and India. Some have demonstrated the seriousness of work deviance. For instance, in *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 86 FEP Cases 1409 (2001), a restaurant manager and female server has engaged in consensual relationship for some time. However, the subordinate decided to break off the relationship. The manager decided to terminate her relationship. On hearing the case, the Indian court decided to penalize the manager. Another recent case is *Freescala Semiconductor Malaysia Sdn Bhd Vs Edwin Michael Jalleh and Mahkamah Perusahaan Malaysia* No. 2160/2008, which was a subject of sexual violence.

Edwin Michael Jalleh and Mahkamah Perusahaan Malaysia were penalized for sexual offending their female colleagues by touching them inappropriately.

Deviant behaviors at workplace are particularly pronounced. Faradahwati (2004) establishes that whereas workplace violence is treated with a lot of importance in other parts of the world such as United States and Europe, it sometimes sounds a new concept in the context of Malaysia and India. This is in light of over 150, 000 cases of reported workplace violence each year, characterized by rape, assault, and robberies. Atkinson (2000) documents forms of violence at workplaces in India and Malaysia include biting, squeezing, threats of violence, shooting, hitting, kicking, beating, and issuance of insults. The study also notes that the issuance of insults is particularly rampant at workplaces, accounting for as significant as 73 percent and 67 percent of workplace violence in Malaysian and Indian context, respectively.

Baron and Joel (2009) established that workplace violence in many countries, including Indian and Malaysia might be low because many cases are not reported. Chappell and Vittorio (2000) established that the workplace-related violence in Malaysia is rampant, yet it is rising. For instance, the study noted that employees, as well as employers report well over 50 cases of workplace violence to Labour Department each month. Mohd (2003) investigates the nature of workplace relationships and workplace violence in the context of Hotel workplaces, including Indian and Malaysian workplace environments. The study finds that workplace violence is particularly high, characterized by insults, often directed towards female gender. Keim (1999) observes that workplace is rampant in India, and has far-reaching implications.

The study notes that as far the context of Malaysia is concerned, the cases of workplace violence has been on the increase. For instance, as significant as 934 cases were reported in 2000, compared to 421 reported in 1995. In 2010, over a thousand cases were reported. The Industrial Law Reports also recorded an increasing number of cases recorded. Lord (1998) notes that that, whereas there are still many cases of workplace violence, many of which go unreported, organizations are acknowledging the seriousness of the cases of workplace violence, and are even coming up with organizational initiatives to define the culture that would discourage cases of workplace violence.

However, employers are ignorant and languish in silence to address the cases violence in their areas of work. Brazier (2011) describes loopholes within the Malaysian legal context. For instance, the penal code is not applicable to the cases of workplace violence — it is only limited to the acts covered by the penal code. For example Penal Code, section 509 had stated that it was an offence insulting the modesty of any woman, but does not say anything for the cases of a man. National Institute of Occupational Safety and Health (2009) concludes that whereas there a number of approaches that have been adopted to address workplace violence, these are limited in one common way — they only focus on punishing wrongdoers, instead of stipulating how such conflicts could be avoided. Because of this, members of the organizations are helpless in preventing cases in which violence is predicted to occur (Ayoko *et al.* 2010).

This study observes increasing cases of workplace violence. The study further notes that while the society is now acknowledging the need for addressing violence, Malaysia and India have been relying on only the Employment Act

1995 and the Penal Code, which are not sufficient. Pidgeon (2011) also notes that existent statutory legislations are limited. The study proposes Occupation Health and Safety Framework, as a way of complementing the existent legislations. Rohana & Shamsudin (2010) acknowledges that the milestones have been achieved, as evidenced by the number of cases related to workplace violence that have been tried in India courts. The Employment Act creates the allowance for dismissal of employees with misconduct, but it is largely reactive in nature considering that it does not stipulate ways in which organizations could prevent violence from occurring. Indeed, according to Tepper *et al.* (2009), while many deviant incidents are taken to courts, about 3 percent are followed by penalty actions. These are attributable to flaws within the systems.

Since deviant workplace behaviour is associated with enormous economic and psychological costs to the organizations and its employees, managers are not only interested in identifying the factors that lead to deviant workplace behaviour, but they are also interested in identifying solutions to prevent and reduce such negative behaviours. Hence, it is important to have a hand on recommendations about how to prevent deviant workplace behaviours (Punia and Himanshi, 2013). And this study is a step towards identification & integration of the possible solution sets for preventing deviant workplace behaviours. The possible solutions that can be adopted by management to prevent deviance and covered in this study include: ethical organisational culture, effective personnel selection, integrity tests, maintaining psychological contract but also more importantly, providing proper organisational justice and adopting green organisational behaviour to guarantee that employees are satisfied with their organization and contribute to environmental sustainability.

Thus, it seems Malaysian case is not exception, based on comparison of some of its neighbors within Asia. This is particularly evidenced for the case of India. In all cases, these countries are heavily reliant on employment legislations, the penal code and OSHA to address issues on workplace safety, which all share a common flawed characteristics, yet the trends in workplace deviance incidents are pronounced. Indeed, as Brazier (2011) documents that Employment Act regulates the relationship between employers and employees. The Act gives the employers the power to terminate contracts without compensation in cases where there is willful breach by the other part of the contract. This lays out what employees can do if potentially faced with deviance such quitting. However, such options are only unrealistic and costly to the victims. Penal code lays out punishment for the workplace deviants. Considers workplace deviance as a criminal act. The workplace deviants can be charged on the basis of Penal code.

Predominantly, it is obvious that the law intends to punish the wrongdoer, however, the statutory legislations prevailing do not seem to provide legal redress to the victims. However, this is not comprehensive. For instance, section 509 stipulates that insulting any woman is a criminal offence, but does not say anything about cases in which men are insulted. Thus, it is not inclusive. OSHA is a framework for addressing safety at the workplace. It considers workplace safety from multispectral terms including deviance and violence and robbery, among others. Although the act fails to specify what safety should entail. The OSHA 1994 serves the purpose of protecting other people against the risks that could occur in line of duty at the workplace. However, it is not well integrated in

torts for deviance behaviors. Trespass to persons regulates the relationship between people in the public and relates to penal codes. It considers that people are entitled to basic freedoms and rights. Infringing basic rights and freedoms is criminality. However, it relies on other clauses to address workplace deviance, considering that not all workplace deviant behaviors may be tried as trespass, especially deviance directed at workplace property and values.

RECOMMENDATIONS

Considering a number of flaws, this section acknowledges that by adopting certain measures, there is always the possibility to address the rampant forms of workplace deviance within the Malaysian and Indian context. One point that need to be particularly acknowledged is the fact that addressing workplace deviant counts on concerted efforts. It requires liaising between jurisprudence and the society. In this case, the society entails employees at the workplace, the management and people who interact with the workplace.

In essence, the effectiveness of torts needs to be complemented by a number of approaches. Since diversity is considered to one of the causes of workplace deviance, diversity management should be considered a recommendable complementary approach. This would hold managers responsible to enforce the torts on workplace deviance. Indeed, the concept of diversity management is increasingly gaining popularity in the work environment. Diversity management can be defined as a process that aims at creating and maintaining a harmonious working environment, wherein individual differences, as well as similarities, are considered valuable to enable individuals' potential to be tapped, and their contributions towards organizations maximized. In organizations, the existence of staff employees with varying cultures, upbringing, as well as nationalities is expected. It is therefore important that organization device proper ways of diversity management for employees to comply. Diversity management aims to offset chances of occurrence of conflicts because of diversity (Robinson and Rebecca, 2011).

It is noted torts also have certain flaws. In particular, it has been noted that Malaysian and Indian torts are not explicit about certain instances such as what needs to be done to prevent occurrence of violence in the cases that workplace deviance is predicted. A paradigm has emerged that there is more to assuring safety at the workplace than simply assuring justice (Rohana & Shamsuddin, 2010). For example, one needs to question ways in which workplace deviance should be prevented, in the cases in which it is predicted to occur. This advances the notion that torts on workplace deviance are particularly limited at such instances.

Reviewed literature exemplifies a number of elements, ranging from loopholes in torts to lack of sensitization of people in Malaysian workplaces. In this regard, there is the need to amend the torts to reflect the objectives of assuring workplace safety. It is particularly noted that penal code is not applicable to the cases of workplace violence — it is only limited to the acts covered by the penal code. For example Penal Code, section 509 had stated that it was an offence insulting the modesty of any woman, but does not say anything for the cases of a man. Employment act, penal code and code of trespass are reactive and not self-regulated; has limited provision on workplace safety. They

need to be holistic and self-regulated. There is the need to rethink and amend certain elements of workplace safety to address the flaws.

Moreover, there is the need to sensitize the public on the needs and legislations on workplace safety. There is the need for workers to know their rights while the workplace, as well as ways to act within the workplace settings. This is in light of the fact that workplace deviance is rampant, but which is often unreported. The low reporting rates is attributable to lack of legal awareness. Deviance might also be rampant because people do not understand the limits of workplace behaviours. Sensitization will go a long way in informing people on the needs of workplace safety, as well as on what to do in cases of workplace deviance.

CONCLUSION

Organizations who fail to adopt a culture centered on ethical values and do not make an account for fair justice to all employees, face serious consequences in form of economical and psychological costs to the employees and organizations. Restructuring of an organization's norms, policies, procedures, attitudes and social values is imperative for the survival of that organization. It is therefore in the best interest of the organization's functioning to ensure that even the mildest form of misbehaviour is not condoned. Fortunately, there is much a management can do to reduce the occurrence of employee deviant behaviour for example Everton *et al.* (2005) stated to be fair, be empathetic, be informative, and be supportive and in short, be nice and Jackson *et al.* (2012) recommends to adopt green organisational behaviour regime to have environmental sustainability. This study calls for the empirical research to investigate further into the presence of different kinds of deviant workplace behaviours and how the law can provide recourse on legal redress to the victims of such conduct.

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