

## Prevention of Sexual Harassment: The Islamic Law (Syariah) Perspective

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### Abstract

Sexual harassment is a common phenomenon today in the workplace and tertiary educational institutions, among others. The effect is that it destroys family ties and relations. To prevent this nagging problem, Islamic law has made provisions on matters that relate to sexual harassment. It has put in place certain mechanisms to prevent sexual harassment. One way of dealing with the problem is the legalisation of the institution of marriage and prevention of celibacy. Apart from this, severe punishments await those who commit fornication which is the objective of sexual harassment. Similarly, the Creator has ordained the believers, male and female alike, to lower their gaze and control their sexual organs in such a way that would not lead them to sexual sins nor should they stare at the opposite sex in such a way as to cause sexual harassment. This shows that it is not allowed for Muslims to put unacceptable lusts in the hearts of others by any form of harassment. In a similar vein, the Messenger of Allah (PBUH) forbade all avenues that can lead to sexual harassment and this includes prohibiting people of different sexes from sitting or from having discussion in a private or secluded area. In addition, Islam does not permit a woman to travel without a ma'hram like her husband, father, uncle, brother, and son. On the same token, respect for one's privacy is highly protected in Islam even with respect to children. Children would need to obtain the permission of their parents before they enter the rooms of their parents in certain periods. This is also a measure to prevent any forms of sexual harassment. Having said the above, this paper will discuss the preventive aspects of sexual harassment from the Islamic Law perspective with special focus on the primary sources of Islamic Law.

**Keywords:** Sexual Harassment; Preventive Measures; Islamic Law

### Introduction

Sexual harassment can occur in the workplace or at the schools or tertiary institutions, among others and its usual occurrence is between people of the opposite sex but it can also take place between the same sexes although such occurrence is rare. Sexual harassment refers to an unwelcome or unwanted sexual advances or invitation to engage in a sexual activity; unwanted physical contact of a sexually harassing nature, including non-consensual touching, grabbing, pinching, hugging, brushing against a person's body, or staring; or displaying sexually suggestive objects or pictures or obscene gestures; and making sexually derogatory comments. The above conducts are despicable acts and are abhorred by the international community as it is insulting a person's honour and dignity.

Likewise, Islam has placed special importance in the protection of one's dignity and moral values. Not only promiscuity is prohibited but all doors that lead to illegal sex such as *khalwat* (close proximity at a scheduled place), free mixing of the sexes, provocative dress, nudity, obscenity and pornography, among others, are also prohibited. Further, even making a false or unfounded allegation of promiscuous relationship is prohibited. If a man accuses a woman of immorality but does not provide proof of his accusation, then not only is he exposed to the penalty prescribed for false accusation (slander), but he will also be declared in perpetuity as unworthy of giving evidence before a tribunal.<sup>1</sup>

Having said the above, this paper discusses the Islamic principles to combat sexual harassment with reference to the primary sources of Islamic law namely, the Qur'an and the Sunnah (tradition) of the Prophet (PBUH) (Peace and Blessings of Allah be Upon Him) and also its practice in Malaysia, a highly multi-ethnic country with Malays, Chinese and Indians constituting the three biggest ethnic groups with the Muslim population consists of slightly more than 53%. It is noteworthy that while Islamic law is not the governing law, but Islam being the official religion,<sup>2</sup> many other countries have recognised Malaysia as a model Muslim State. Hence, the relevant

<sup>1</sup> See the Qur'an, *Surah An-Nur* (Chapter 24): verses 4-5.

<sup>2</sup> By virtue of art 3 of the Federal Constitution, Islam has a special position in Malaysia, with the Ruler of a State of the Federation being the head of the religion of Islam in his state and the Yang di-Pertuan Agong being the head of the religion of Islam in the Federal Territories of Kuala Lumpur, Putrajaya and Labuan in addition to being so in his own state and in the states of Malacca, Penang, Sabah and Sarawak. See *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793, SC. See also Dato' Faiza Tamby Chik, *Malay and Islam in the Malaysian Constitution* [2009] 1 MLJ cxxix. It must be added that the Islamic religion in article 3 of the Federal Constitution is dealt with in the context of acts related to

Islamic statute relating to sexual offences particularly in relation to sexual harassment is discussed in this article with reference to the decided cases.

### **Honour and dignity in Islam**

As Allah's vicegerent on earth, man has been created to a position of honour.<sup>1</sup> Upholding the honour and dignity of another irrespective of their religious faith is highly regarded in Islam. Further, Muslims are enjoined into doing righteousness and forbidding wrongs which should be in harmony with what Allah (SWT) loves and disapproves. 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 Qur'an and the Sunnah of the Prophet (PBUH) repeatedly warn against violating human dignity and honour. The Qur'an states: "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".<sup>2</sup> From the above, love for other members and respect of their right, concern for their welfare and reputation are the commandments of Allah.

In another verse, Allah (SWT) says; "...nor defame nor be sarcastic to each other, nor call each other by (offensive) nicknames: Ill-seeming is a name connoting wickedness, (to be used of one) after he has believed: And those who do not desist are (indeed) doing wrong. O ye who believe! avoid suspicion as much (as possible): for suspicion in some cases is a sin: and spy not on each other, nor speak ill of each other behind their backs. Would any of you like to eat the flesh of his dead brother? Nay, ye would abhor it...but fear Allah: for Allah is Oft-Returning, Most Merciful."<sup>3</sup>

Again, in *Surah Al Nisa* (chapter 4): verse 148, it 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". Abdullah Yusuf Ali, in his commentary to the above verse stated inter alia, that this verse generally refers to acts that can give rise to an evil public scandal like malicious gossip, libel or slander deliberately intended to cause harm to a person's reputation or injure them in other ways. Sexual harassment has a tendency to create an evil public scandal if it is ignored and the perpetrator allowed to prey on innocent unconsenting parties.

Further, on the importance of guarding and preserving the honour of man, Prophet (PBUH) stated: "Whoever saved the honour of his brother, Allah (SWT) will save his countenance against the blaze of fire on the Day of Judgment".<sup>4</sup> Again, "it is not for a believer to indulge in insults, sarcasm or cursing".<sup>5</sup> In a related *Hadith*, Prophet Muhammad (PBUH) 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".<sup>6</sup>

It is thus clear from the above authorities of the Qur'an and Sunnah that man was created in honour above all other creation and are guided on how to maintain this honourable position given to them by the Creator. The Qur'an and Sunnah not only reproaches major evils such as defamation, sarcasm, insulting and cursing, but also touches on little evils such as forbidding one from even laughing at another; as Allah (SWT) warns that the other might be better than the one who laughs at him. Although laughing might be only a small matter, it can cause hurt to a person. Anything to hurt the honour and dignity of a person is forbidden except if it is to uphold justice, when injustice has been done.<sup>7</sup>

### **Sexual harassment: The Preventive measures in the Qur'an and Sunnah**

Having said the above, the *Syariah* has provides a certain guidelines as to how male-female must conduct

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rituals and ceremonies: see See *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 (SC); and *Fatimah bte Sihi & Ors v Meor Atiqulrahman bin Ishak & Ors (Minors, suing through Syed Ahmad Johari bin Syed Mohd)* [2005] 2 MLJ 25 (CA).

<sup>1</sup> See the Qur'an, in *Surah Al-Isra* (chapter 17): verse 70, where it is mentioned that Allah has honoured the sons of Adam.

<sup>2</sup> See *Surah Al Hujurat* (chapter 49): verses 11.

<sup>3</sup> See *Surah Al Hujurat* (chapter 49): verses 11-12.

<sup>4</sup> Cited in Mohammed Hashim Kamali, *Freedom of Expression in Islam* (Kuala Lumpur: Berita Publishing Sdn. Bhd., 1994) 119.

<sup>5</sup> Al Tabrizi "*Mishkat*" Vol. 1 Hadith No. 4847.

<sup>6</sup> Tirmidhi, *Sunan* III, 255.

<sup>7</sup> *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".

themselves with one another. The wisdom is to prevent ill conduct between the opposite sexes and closed all doors that can lead to temptation, sexual harassment, rape and adultery. The guidelines are as follows.

#### **(i) Lowering of the gaze**

Allah (SWT) specifically commanded the believing men and women alike to lower their gaze. The Qur'an, in *Surah an-Nur* (Chapter 24): verse 30, states "Tell the believing men that they should lower their gaze and guard their sexual organs; that is purer for them. Indeed, Allah is well-acquainted with what they do. Again, in the same *Surah*, the first part of the next verse (verse 31) provides; "And tell the believing women that they should lower their gaze and guard their sexual organs." It is forbidden that any person should look at the *awrah* (intimate parts of the body) of another, whether of the same or the opposite sex, and whether with or without desire. Adding on to the above, the Prophet (PBUH) said; "A man should not look at the *awrah* of another man, nor a woman of a woman, nor should a man go under one cloth with another man, nor a woman with another woman".<sup>1</sup> For a man, the *awrah* is from his navel to his knee, while a woman's *awrah* is her entire body except only her face and hands. The Prophet (PBUH) also added that, "The eyes also commit *zina*, and their *zina* is the lustful look".<sup>2</sup> Therefore, it is obligatory for a woman to cover her entire body. This is further strengthened by a *hadith* whereby the Prophet (PBUH) says; "that the second glance is prohibited".

Moral decay is one of the consequences of misuse of the eyes. It can cause desire that can lead to adultery and at a lesser scale, it can lead to abhorred acts that amount to sexual harassment that varies in its degree of severity. Therefore, the Qur'an and Sunnah have given a way for the Muslim to prevent getting involved in these disgraceful acts - the first step is to lower the gaze for both men and women. The second step is to ensure that they are not thrown into a position where they would have to avert their gaze. This would require the element of decent dressing. It must be added that the rule of lowering the gaze is merely a religious command, obedience of which brings happiness to man in this world and in the next.

#### **(ii) Decent dressing**

In order for women and men to have respectful relationships such as at the workplace or school, among others, they must focus on modesty in their behaviour. The Qur'an provides a second shield from preventing these lewd acts, namely, decent dress. The Qur'an not only outlines the criteria of modest dressing but also gives the reasons for doing so, as found in the verses below. The Qur'an, Chapter 24: verse 31, describes the criteria of dress for women that is considered modest in Islam. "And tell the believing women that they should lower their gaze 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. And O you believers, Turn you altogether towards Allah, that you may attain bliss." The verse clearly states that a Muslim woman must be properly covered in the presence of strangers and non-*Mahram*<sup>3</sup> relatives. It further lists the people with whom she is permitted to be less exhibitively. Again, in another verse namely, *Surah al-Ahzab* (Chapter 33): verse 59, the Qur'an states other reasons for decent clothing; 'O Prophet! tell thy wives and daughters, and the believing women, that they should cast their outer garments over their persons (when abroad): that is most convenient, that they should be known (as such) and not molested: and Allah is Oft-Forgiving, Most Merciful'. This verse makes it incumbent on the believing woman, even today, to conceal their beauty and adornment from strangers. It is worth noting that the above injunctions of the Qur'an apply to this very day and in fact, till the end of time, as the Qur'an was sent as a universal message to mankind.

In some Muslim countries, such as Saudi Arabia and Iran, it compulsory for women to wear the *hijab* (head scarf) at workplace and in the schools, while other countries such as Egypt, Jordan, Syria, Algeria and Bosnia, among others, it is merely optional and not forced upon the woman. However, in some Muslim countries, majority of the women prefer to adorn the *hijab*, like Yemen and United Arab Emirates. Similarly, in Malaysia, it is optional for Muslim girls to wear *hijab* in schools. However, in the Islamic organisations and institutions of higher learning, it is compulsory for its staff and students to wear the *hijab*, dress according to Islamic dress code and

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<sup>1</sup> *Sahih* Muslim.

<sup>2</sup> *Sahih* al-Bukhari.

<sup>3</sup> *Mahram* refers to either her husband or any male relative with whom her marriage is permanently prohibited. The term '*mahram*' is further discussion in footnote 17 below.

display proper Islamic ethics.<sup>1</sup> In an attempt to maintain these rules, disciplinary action could be taken if these rules are flouted. Other than this, many women in government organisations have chosen to wear the *hijab* although it is not made compulsory for them.<sup>2</sup> It is submitted that indecent and provocative dress attracts eyes and inevitable may attract other despicable acts and behaviour. It cannot be denied that even women who are modestly dressed have occasionally experience sexual harassment. However, in a society where both men and women are dressed modestly and decently it could avoid unnecessary glances and further advancements from the opposite sex, and thus, could minimize the risk of being sexually harassed.

### (iii) Guarding chastity: Preserves one's honour and dignity

Islam concentrates on the foundation of chastity to protect honour and dignity. A Muslim is not supposed to yield to their desires except if it is for legal means. Exposing the attractive parts of the body, walking or talking in a seductive manner, displaying of a ladies ornaments, wearing revealing and seductive clothes in public places is prohibited. In many verses in the Qur'an, Allah (SWT) tells mankind to "guard their chastity". In *Surah Al-Muminoon* (23), verse 5, Allah (SWT) reveals that among the successful believers are, "those who guard their chastity (i.e. private parts, from illegal sexual acts)". Again, in *Surah Al-Maarij* (70): verses 29 and 30, Allah (SWT) says, "And those who guard their chastity. Except with their wives and the (captives) whom their right hands possess<sup>3</sup> - for (then) they are not to be blamed. But those who trespass beyond this are transgressors". In *Surah al Maarij* (Chapter 70): verses 19-35, Allah (SWT) explains that among those that will inhabit the gardens of bliss (paradise) are those who have guarded their chastity. The winners of Paradise are further described in *Surah Al-Shura* (Chapter 42): verses 36 – 43, among them being those who avoid greater crime and shameful deeds. In a related *hadith*, At-Tirmidhi relates that the Prophet (SAW) said, "The first three to enter paradise were shown to me: A martyr, a chaste person, and a slave who perfected his worship of Allah and remained faithful to his master."

Guarding chastity from immorality is one thing that can purify the soul, bring peace to nations, and maintain security. According to Islam, "chastity" is what restrains the human behaviour from deteriorating into despicable desires. Chastity finds expression in human decency and there appears in it purity, and human virtue.<sup>4</sup> A man or woman who is chaste would be very unlikely to perform acts that would lead him to other despicable acts. To start with, they would lower their gaze in the presence of the opposite gender as discussed earlier. To sexually harass another would definitely be far from their minds as they fear Allah. In other words, believers who live by the Qur'an would refrain from vain talks and actions that would prevent their entry into paradise. This is in line with the saying of the noble Prophet (PBUH); "Allah will shade seven in His shade on the day when there will be

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<sup>1</sup> See for example 'Students' Discipline Rules 2004, International Islamic University Malaysia; Section 27 states that (1) *Muslim* students are expected to dress in a manner considered proper by the *Syariah*. (2) *Non-Muslim* students may adopt the *Islamic* dress if they so desire. Otherwise they should dress in accordance with the University Dress Code. Such mode of dress shall also be decent, neat and clean. (3) Any student who is inappropriately attired will be barred altogether from entering all academic and administration buildings and shall be guilty of a disciplinary offence.

<sup>2</sup> See for example *Hajjah Halimatussaadiyah Binti Kamaruddin v Public Services Commission, Malaysia & Anor* [1994] 3 CLJ 532 (SC).

<sup>3</sup> When the message of Islam was first received by Prophet Muhammad (PBUH), it came to address the ignorance of the people that existed at that time. Slavery was also a common practice in Arabia at this time. It was common that victorious nations took their captives as slaves and servants, treating them mercilessly as mere commodities as it was recorded in history throughout the world and even today, still thrives on in secret. Islam was the first in history that safeguarded the rights of slaves more than fourteen centuries ago. Prophet Muhammad (PBUH) gave them human rights, upgraded their position in society and called upon the people to treat them with kindness. The abolishment of slavery in Islam was a gradual process as it was an age-old practice. This is the wisdom of the teachings of Islam. It was abolished in a gradual manner to help both the Master and the slave cope with changes in the treatment of slaves.

In the transitional period, it allowed for slaves to continue working for their masters in their homes, where masters were required to treat them with kindness, provide food and clothing for them. Had slavery been suddenly abolished, it would have seen slaves thrown out of homes, and this would have created beggars and thieves. It would have created a class of people that due to their helplessness, would have become a menace to the community. Instead, the Qur'an and *hadith* gave clear injunctions on the treatment of slaves in the first stages. At the same time, masters were encouraged to emancipate their slaves as acts of penance and piety. Eventually, due to the teachings of Islam, the notion of slavery is now completely extinct throughout the Muslim world: see Dr. (Mufti) M. Mukarram Ahmed et.al., *Encyclopaedia of Islam Vol. 3 (Obligations in Islam)* 2005, Crescent News (K.L) Sdn Bhd. at 38. It is totally opposite, looking at captives of war today, better known as prisoners of war. The prisoners of war are literally imprisoned, tortured to death, humiliated, taken photographs of their humiliated victims upload it on internet among others. These are evident from the invasion on Vietnam and Iraq. In Islam however, captives were taken in as slaves but as mentioned above, guidelines for their kind treatment was laid down in the Qur'an and seen through the practice of Holy Prophet (PBUH).

<sup>4</sup> Chastity by Husayn ibn 'Abdul "aziz Aal Sheikh [http://www.islaam.net/main/display\\_article\\_printview.php?id=402](http://www.islaam.net/main/display_article_printview.php?id=402)

no shade but His shade...(and one of them was)...a man who is approached by a beautiful woman, and he said, 'I fear Allah.'" The virtues of guarding chastity are therefore seen as a gift to man by Allah.

The passage of time has desensitized man on issues of chastity, especially through the media and globalisation among others. Man is fast to follow latest trends and ways of life that appeal to him; even though it may not be the right way. As a consequence, in many places around the world, immorality has become a way of life, i.e., something normal to that society; where for example it would be normal for a man to hold and touch a woman with her consent, take her out on a date till the next morning. In some societies however, this is taboo based on culture; but it is rapidly beginning to accept these immoral acts as something normal.

#### (iv) Proximity between opposite sexes to be avoided

In Islam, while mixing between man and woman for a good cause is allowed, the close proximity between those who are not related to one another in the degree of *mahram* relationship<sup>1</sup> is prohibited. Prophet (PBUH) said: "Whoever believes in Allah and the last day must never be in proximity with a woman without there being a *mahram* with her, for otherwise *satan* (*Iblis*) will be the third person (with them).<sup>2</sup> The ultimate goal of *satan* is to see human thrown into hellfire and prevent them from entering paradise.<sup>3</sup> The *satan* promised, as the Qur'an proclaims: "I will mislead them and I will create in them false desires; I will order them to slit the ears of cattle and to deface the (fair) nature created by Allah. 'Whoever, forsaking Allah, takes *satan* for a friend, hath of a surety suffered a loss that is manifest"<sup>4</sup> In *Surah Yusuf* (Chapter 12): verses 23 and 24, Allah (SWT) related the story of Prophet Yusuf and Zulaikha, the wife of the Egyptian minister, where *Satan* had attempted to influence them to commit illicit acts when they were alone together. The Qur'an proclaims: "And she, in whose house he was, sought to seduce him (to do an evil act), and she closed the doors and said: "Come on, O you (dear one)." He said: "I seek refuge in Allah (or Allah forbid)! Truly, he (your husband) is my master! He made my living in a great comfort! (So I will never betray him). Verily, the Zalimun (wrong and evil-doers) will never be successful." And indeed she did desire him and he would have inclined to her desire, had he not seen the evidence of his Lord. Thus it was, that We might turn away from him evil and illegal sexual intercourse. Surely, he was one of Our chosen, (guided) slaves, sincere and purified."<sup>5</sup>

In Malaysia, if a man is found being alone together with a woman who is neither married to him nor is related to him at the degree of *mahram*, in any secluded place or in a house or room under circumstances which may give rise to suspicion that they were engaged in immoral acts, both the man and woman shall be deemed to have committed an offence which will be liable for punishment. In particular, section 27 of the Syariah Criminal Offences (Federal Territories) Act 1997, states 'Any man who is found together with one or more women, not being his wife or *mahram*; or woman who is found together with one or more men, not being her husband or *mahram*, in any secluded place or in a house or room under circumstances which may give rise to suspicion that they were engaged in immoral acts shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both'. The application of the above provision may be illustrated with reference to the decided cases as per the table below.

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<sup>1</sup> *Mahram* refers to either her husband or any male relative with whom her marriage is permanently prohibited. The prohibited degrees of marriage are laid down by the Holy Qur'an, Surah Al-Nisa (4): 22-24. "Prohibited to you (for marriage) are—your mothers, daughters, sisters, fathers sisters, mothers sisters; brothers daughters, sisters daughters; foster-mothers (who gave you suck), foster-sisters; you wives mothers; your step-daughters under your guardianship, born of your wives to whom you have gone in. No prohibition if you have not gone in those who have been wives of your sons proceeding from your loins; and two sisters in wedlock at one and the same time, except for what is past. For God is oft-Forgiving, Most Merciful. Also prohibited are women already married except those whom your right hands possess. Thus has God ordained against you. Except for those all others are lawful, provided you seek them in marriage with gifts from your property, desiring chastity not lust. Seeing that you derive benefit from them give them their dowers as prescribed; but if after a dower is prescribed, you agree mutually to vary it there is no blame on you. And God is All-Knowing, All-Wise". See also the Islamic Family Law (Federal Territories) Act 1984, section 9 which sets out the relationships prohibiting marriage. Therefore, other than those mentioned in the prohibited degrees, all others are considered as non-*mahram* towards whom close-proximity is prohibited.

<sup>2</sup> Ahmad Ibn Hanbal, *Al-Musnad*, Vol 11, p 286.

<sup>3</sup> "Verily *satan* is an enemy to you: so treat him as an enemy. He only invites his adherents, that they may become Companions of the Blazing Fire" (*Surah Fatir* (Chapter 35): verse 6).

<sup>4</sup> *Surah Al-Nisa* (Chapter 4): verse 119.

<sup>5</sup> This is the wisdom of choosing Prophets from among the people. Prophets were human and they too made mistakes. However, guidance can be obtained from their strength in *Iman* (faith) as to how they resisted the temptations of their *nafs* (desire) through the remembrance of Allah (SWT) and the supplications they made to seek Allah's guidance.

Name of case	Sentence	Remarks
<i>Pendakwa v Zahid Nasir and Juniadah</i> <sup>1</sup>	RM3,000 fine or three months imprisonment	The Syariah court found the accused persons, based on their admission, guilty of committing the offence of <i>khalwat</i> . They were each sentenced to a fine of RM3,000 or shall be ordered to three months imprisonment in lieu of the unpaid fine.
<i>Pendakwa Syarie, Kelantan v Mat Rahim &amp; Anor</i> <sup>2</sup>	Acquitted and discharged	The two accused person were charged with <i>khalwat</i> . In their defence the accuseds alledged that they were legally married in Thailand according to the Islamic Law. They produced two witnesses and also the documents showing their marriage performed in Thailand. Their marriage was also affirmed by the Council of Islamic Religion, Narathiwat, Thailand. An opportunity was given to the prosecution to investigate further into the matter but the prosecution argued that the burden was on the accused to prove that the marriage in Thailand was valid. The Syariah court held that the evidence produced by the accused could not be set aside unless it could be shown that they were forged. Hence, the accused persons were acquitted and discharged.
<i>Syarie Prosecutor v Sukree bin Masuyu</i> <sup>3</sup>	Fine of RM3,000	The accused was charged and convicted for committing <i>khalwat</i> with two women who were neither his wives nor his <i>mahram</i> , in which the act of the accused had raised a reasonable suspicion that he was involved in the commission of an immoral act. In the said case, the accused was convicted based on his confession which was made voluntarily, without any inducement, threat or coercion. The Syariah court held that the act of the accused with the two females who were not his <i>mahram</i> being present at the rented house, had raised a reasonable suspicion that he had committed an immoral act with them.
<i>Syarie Prosecutor v Mohd Zulkifli Bin Adam &amp; Anor</i> <sup>4</sup>	Fine of RM2500 and imprisoned for a week	The accused persons were charged for committing <i>khalwat</i> and they pleaded guilty. Prior to this offence, they were previously convicted for a similar offence and a fine of RM500 and RM800 were imposed upon them, respectively. It was stated that the accused persons have no remorse but have challenged the institution of the court. The earlier fine imposed on them by the Syariah court hardly had any effect on them as they considered the punishment a meager sum and viewed that each time they committed the offence they could get away with a mere fine. Hence, a severe sentence coupled with imprisonment was deemed appropriate to the current circumstances as this would serve a lesson to the offenders from repeating the offence and a deterrent to the public from committing similar crime.
<i>Pendakwa Syarie v Muhaizad Bin Ahmad Mustapha (Ako Mustapha)</i> <sup>5</sup>	RM3000 fine and three months imprisonment	In the above case, the accused was found alone with a non-Muslim woman who was neither his wife nor his <i>mahram</i> . The accused pleaded guilty to the charge. It was stated that an act of <i>khalwat</i> with a <i>non-mahram</i> , even if it is with a non-Muslim, was prohibited by <i>hukum syarak</i> and thus, a severe sentence was warranted considering the fact that such crimes are on the rise and further, to reform the accused and deter others from committing such offence.

It must be added that section 27 of the Syariah Criminal Offences (Federal Territories) Act 1997 is only applicable to a Muslim<sup>6</sup> and thus, does not apply to a non-Muslim. Further, the Syariah court's jurisdiction is

<sup>1</sup> ((1989) 8 JH 85.

<sup>2</sup> (1992) 9 JH 195.

<sup>3</sup> (2008) 3 ShLR 172.

<sup>4</sup> Criminal Suits Nos. 11006-143-0024-2011 AND 11006-143-0025-2011.

<sup>5</sup> Criminal Case No. 10007-143-29-2008.

<sup>6</sup> The Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) section 2 defined a 'Muslim' as: (i) a person who professes the religion of Islam; (ii) a person either or both of whose parents were, at the time of the person's birth, Muslims; (iii) a person whose upbringing was conducted on the basis that he was a Muslim; (iv) a person who has converted to Islam in accordance with the requirements of s 85 of Act 505; (v) a person who is commonly reputed to be a Muslim; or

only over persons professing the religion of Islam and thus, does not extend over non-Muslims. However, it may still be possible to charge a non-Muslim party in the civil courts for the offence of *khalwat* provided that the act was committed in a public place. For example, in *Ooi Kean Thong & Anor v Public Prosecutor*,<sup>1</sup> the accused persons were found behaving in a disorderly manner under the trees at Kuala Lumpur City Centre Park, to wit, hugging and kissing, an offence under section 8(1) of the Parks (Federal Territory) By-Laws 1981. The said offence carries a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding one year or to both and in the case of a continuing offence to a fine not exceeding two hundred ringgit for every day during which the offence is continued after conviction. The said By-laws were enacted pursuant to section 102 of the Local Government Act 1976. Initially, the matter was compounded by Kuala Lumpur City Hall (DBKL) and the applicants were supposed to pay the fines imposed. Subsequently, they had changed their mind and decided not to pay the fine. Before the Federal Court, the accused persons raised the following question of law: (i) whether section 8(1) of Parks (Federal Territory) By-Laws 1981 was ultra vires section 102 of the Local Government Act 1976 and the effect being that the applicants were deprived of their constitutional right of freedom; and (ii) whether the charge against them was contrary to article 5(1) of the Federal Constitution. The Federal Court in their unanimous decision affirmed that the impugned by-law was *intra vires* section 102 of the Local Government Act 1976 and the Federal Constitution. It was further held that the impugned by-law did not infringe any of the rights as enshrined in articles 5 or 8 of the Constitution. Accordingly, the Federal Court reverted the said case to the High Court for further action.

#### (v) Prohibition of *Zina* or illicit sexual intercourse

*Zina* or illicit sexual intercourse between a man and a woman who are not validly married to each other, is a sinful act and hence forbidden in Islam. Islam regulates the institution of marriage, disciplined sexual behaviour, condemns adultery and prescribes severe punishment for the offence of *zina*. The Qur'an proclaims: "And come not near to adultery: for it is a shameful (deed) and an evil, opening the road (to other evils)" (chapter 17 verse 32). Again, "Those who invoke not with God any other god, nor slay such life as God has made sacred, except for just cause, nor commit fornication, and any that does this meets punishments" (chapter 25 verse 68). "O Prophet! When believing women come to you to take the oath of fealty to you, that they will not associate in worship any other thing whatever with God, that they will not steal, that they will not commit adultery (or fornication) that they will not kill their children, that they will not utter slander, intentionally forging falsehood and that they will not disobey you in any just matter then do you receive their fealty" (chapter 60 verse 12).

The involvement of an unmarried male or female in a sexual relationship is called fornication. Where both or either of them is/was married to some other male or female, then the sexual relationship is called adultery. The punishment for fornication is one hundred lashes as provided in the Qur'an: "The woman and the man guilty of fornication flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the last day: And let a party of the believers witness their punishment" (chapter 24 verse 2). While the punishment for adultery is stoning to death and this is contained in the tradition of the Prophet (SAW) that, "The killing of a Muslim is not permissible except in three cases: (i) when he kills another person; (ii) when he commits *zina* after being married; and (iii) when he apostates." (Abu Daud).

In Malaysia, consensual sexual intercourse is not a crime in the Penal Code provided that the complainant was not below sixteen years old. However, if the complainant is below sixteen years, the defendant may be convicted for statutory rape even if the complainant explicitly consented to the sexual contact and no force was used by the actor. However, sexual intercourse out of wedlock even with mutual consent is an offence under the Syariah Criminal Offences (Federal Territories) Act 1997. In particular, section 23 provides: "(1) Any man who performs sexual intercourse with a woman who is not his lawful wife shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding

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(vi) a person who is shown to have stated, in circumstances in which he was bound by law to state the truth, that he was a Muslim, whether the statement be verbal or written. Meanwhile, the Federal Constitution, article 160, defined the word 'Malay' as a person who professes the religion of Islam. In *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Anor* [2004] 2 MLJ 119, the 'persons professing the religion of Islam' was defined as a the person who is brought up as a Muslim or his/her upbringing was conducted on the basis that he/she was a Muslim, he/she lived as a Muslim with his/her family and is commonly reputed to be a Muslim. All this is strong evidence of his/her being a person who professes the religion of Islam. See also *Wan Khairani Wan Mahmood v Ismail Mohamad & Anor* [2007] 6 CLJ 582; *Kaliammal A/P Sinnasamy v Majlis Agama Islam Wilayah Persekutuan (Jawi) & Ors* [2012] 3 MLJ 694; Dato' Faiza Tamby Chik, "Malay and Islam in the Malaysian Constitution" (2009) 1 MLJ cxxix.

<sup>1</sup> [2006] 3 MLJ 389.

three years or to whipping not exceeding six strokes or to any combination thereof. (2) Any woman who performs sexual intercourse with a man who is not her lawful husband shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.” It must be added that section 134(1) Syariah Court Criminal Procedure (Federal Territories) Act 1997 provides that a person who has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall not, while such conviction or acquittal remains in force, be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him. It may be added that the application of Syariah in Malaysia is restricted in the area of Muslim personal law and minor offences against the precepts of the religion of Islam. The Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355) has restricted the criminal jurisdiction of the Syariah courts. It provided that the jurisdiction of the Syariah courts shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof. In fact, the Syariah court’s criminal jurisdiction is a far cry compared to the court at the lowest tier of the civil jurisdiction i.e., the first class magistrate. A first class magistrate has jurisdiction to try all offences for which the maximum sentence does not exceed ten years imprisonment.

Having said the above, the application of section 23 of the Syariah Criminal Offences (Federal Territories) Act is further illustrated with reference to the decided cases in the table below.

Name of case	Sentence	Remarks
<i>Pegawai Pendakwa Muis v Haji Adib</i> , <sup>1</sup>	Accused acquitted and discharged.	The accused was charged with the offence of illegal sexual intercourse with a woman. The woman had been separately charged and had pleaded guilty. At the trial, the prosecution called two witnesses, the woman concerned and the investigating officer, but the learned Syariah Judge held that this was insufficient to prove the offence of <i>Zina</i> as what was required was the evidence ( <i>shahadah</i> ) of four male witnesses. The confession of the woman, the second accused, was only binding on herself. The case therefore was held to depend on the alleged confession of the first accused himself. The alleged confession was given in writing by the first accused to the investigating officer. However, during trial he denied having made the confession and the learned trial judge held that in effect, the accused had withdrawn the confession. The trial Judge therefore found that no case of <i>Zina</i> had been proven against the first accused and accordingly, acquitted and discharged the accused.
<i>Pendakwa v Amran &amp; Rosnah</i> , <sup>2</sup>	Convicting the accused persons based on their confession	The Syariah Court convicted the accused persons of <i>Zina</i> . The first accused was sentenced to one year’s imprisonment and the second accused to a fine of RM400 or six months imprisonment.
<i>Pendakwa v Ajmee Hamid &amp; Siti Fariha</i> , <sup>3</sup>	Convicting the accused persons based on their confession	The Syariah court convicted the accused of <i>Zina</i> . The first accused was sentenced to a fine of RM800 or ten months imprisonment and the second accused to a fine of RM400 or five months imprisonment.
<i>Pendakwa v Jaffary &amp; Hasliza</i> , <sup>4</sup>	Convicting the accused person	The accused person was charged with the offence of <i>Zina</i> . The first accused claimed trial and after hearing the case the Syariah court found him guilty and sentenced him to a fine of RM1,000 or one year’s imprisonment.
<i>Pendakwa Syarie v Muhammad Fauzullah bin Ahmad Basheer</i> , <sup>5</sup>	Convicting the accused person based on his confession	The accused was charged for committing illicit sexual intercourse out of wedlock and he pleaded guilty as per the said charge by the Syarie prosecutor. The Court sentenced the accused to four month’s imprisonment, four strokes of rattan and a fine of RM3,000.

<sup>1</sup> (1988) 6 JH 306.

<sup>2</sup> (1990) 8 JH 3.

<sup>3</sup> (1990) 8 JH 49.

<sup>4</sup> (1990) 8 JH 105.

<sup>5</sup> Criminal Case No. 14700-142-0061-2010.

Apart from the above, a person who does an act preparatory to sexual intercourse out of wedlock shall also be guilty of an offence. It must be noted that the material element of crime comes into being when the prohibited act has been completed whether the act is positive or negative. If the offender, while committing a crime, completes the prohibited act, he is guilty of the crime in full. A prohibited act is said to be attempted when the offender is not able to complete it. If an adulterer enters the house of a woman with the intention of committing adultery and sits with her in private, he will be guilty of an offence. He will also be guilty if he kisses and embraces the woman. Section 24 of the Syariah Criminal Offences (Federal Territories) Act 1997 provides that an act preparatory to sexual intercourse out of wedlock is a crime. The above section provides: “Any person who does an act preparatory to sexual intercourse out of wedlock shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.” For example, in *Pendakwa Syari’e v Wan Mohd Faizdehar Bin Wan Abdullah*,<sup>1</sup> the accused and his partner were charged of doing an act preparatory to sexual intercourse out of wedlock in a car. Both the accused persons had pleaded guilty. A fine of RM2,800 and three weeks imprisonment or imprisonment for five months for failure to pay the fine, was imposed on them.

### Conclusion

As from the above, Islam prohibits all forms of sexual advancement, in general and includes in the workplace and other public places. In employment for example, an employee, men and women alike, would face each other on a regular basis, Islam has thus regulated their behaviour in that they should dress and behave decently and avoid flirtatious attitudes, among others. This is to avoid any form of desire from the opposite sex that can lead to undesired acts such as sexual harassment. These steps would significantly contribute to the decrease in occurrences of sexual harassment in the workplace or job related assignments away from the workplace. The main idea is to put temptation out of the way. It is the individual belief, his God consciousness and piety that makes a believer refrain from what displeases God and does what pleases Him<sup>50</sup>. In the last Sermon Prophet Muhammad (PBUH) reminded the Muslims by stating “Remember one day you will meet Allah and answer your deeds. So beware do not stray from the path of righteousness after I am gone”. If spirituality is our duty with regards to our Creator, then morality has the same place in our dealings with our fellow beings. In its ardent desire to control the very sources of evil (and not just a few of its manifestations), Islam has imposed, recommended, and otherwise encouraged certain practices which will astonish us sometimes if we do not take into consideration their profound motives. For example, all religions say that fornication and adultery are crimes, but Islam goes further and prescribes the ways and means to diminish these temptations. It is easy but futile to hope and wish that everyone will develop their individual morality in order to resist temptation.

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<sup>1</sup> Criminal Case No. 11005-114-0156-2011.

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