

EMPLOYMENT RELATIONS IN MALAYSIA: PAST, PRESENT AND FUTURE

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Introduction

This paper offers an overview of the employment relations framework in Malaysia, focusing on the current status of three key areas central to the employment relations system, namely, the strength of the trade union movement, security of employment for employees, and the state's position on measures to deal with sexual harassment. It will only examine these sub-systems of the employment relations system as they apply in the private sector where the majority of employees work, this sector is considered the main driver of Malaysia's economy.

The Trade Union Movement

The relationship between employers and employees in Malaysia is regulated by a number of laws which were introduced prior to independence (1957) and in the first decade immediately thereafter. The colonial economy prior to World War II (1939-45) was based on tin mining and rubber plantations. The need for labour in these two industries changed the human landscape of Malaysia (Malaya as it then was) for ever. The colonial government either allowed or actively encouraged the importation of labour from China and India, thus creating the multi-racial society which is Malaysia today. The wages of this growing group of employees were low and working conditions were mostly abysmal. Jomo and Todd explained the lack of governmental interference to improve the lot of workers by saying, 'As a major employer

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itself, the government had a vested interest in keeping labour costs low.² In the late 1930s labour unrest was becoming a major concern for employers. A wave of strikes hit plantations in Selangor which were not only wide-spread but also were frightening to the plantation owners because of the militant behaviour of the strikers.³ At the same time, it was becoming increasingly evident that trade unions were being formed openly, many influenced by the Malayan Communist Party (MCP).

By 1940 the situation was serious enough to warrant the introduction of legislation by the government. However, the outbreak of war, the withdrawal of the British forces who were supposed to protect the country, and the subsequent Japanese occupation (1941-5) of Malaya by the Japanese, meant that this legislation, the Trade Unions Enactment, could not be implemented and neither was there any useful purpose in having such legislation during the Occupation. After the war, there was a period of general chaos, food shortages and continuing unrest. Labourers were far more politically conscious than ever before. In this environment unions sprang up everywhere. By 1947 there were 298 unions in existence with a total membership of some 200,000. It was estimated that nearly half that membership were under communist control.⁴ The Enactment of 1940 was re-introduced and implemented from 1947 onwards. Many of the features of this law remain part and parcel of the Malaysian employment relations scenario today. Most importantly, the Enactment required unions to register, union leaders to be actively employed in the industry which they were representing, and union membership to be restricted in that a particular union could only represent workers in a similar trade, occupation, or industry.

Since the 1950s the trade union movement has divorced itself from communist influence and to a large extent from connections with any political party or platform. Malaysian political parties are not based on broad class support whereby one party defends the interests of labour and another party represents the interests of capital.⁵ The governing Alliance Party which has been in power since independence in 1957 is a grouping of racial-based parties.⁶ Thus, there is no party to which the labour movement could attach itself. Furthermore, the Trade Unions Act 1959 (TUA) specifically prohibits

² K. S. Jomo and Patricia Todd, *Trade Unions and the State in Peninsular Malaysia*, Kuala Lumpur: Oxford University Press, 1994, p. 5.

³ Leong Yee Fong, *Labour and Trade Unionism in Colonial Malaya*, Penang: Universiti Sains Malaysia, 1999, p. 89.

⁴ Wu Min Aun, *The Industrial Relations Law of Malaysia*, 2nd ed., Petaling Jaya: Longman, 1995, p. xxxii.

⁵ These distinctions, which were always rather fuzzy, have become even more blurred today in countries such as the United Kingdom, New Zealand and Australia.

⁶ Even the Democratic Action Party (DAP), the sole opposition party having representatives in Parliament is perceived as a party acting for only one of the Malaysian ethnic groups.

unions from expending their funds for 'political objects' (Section 52, TUA). Trade union leaders may not simultaneously hold a post as an office-bearer in any political party (Section 28, TUA) although the minister of human resources has the power to exempt any person from this provision.

Trade union membership is open to all employees over the age of 16 years, with the exception of members of the police, armed forces, and the prison service. However, there exist a number of legal restrictions which the union leaders see as a major barrier to growth of the movement. Workers can only join a trade union which represents the occupation, trade, or industry in which the worker is employed. Omnibus unions seeking representation for a variety of workers from different industries or sectors is not permitted. Workers in the public sector cannot join forces with their counterparts in the private sector even where the nature of their work is similar. Employees in the states of Sabah and Sarawak⁷ can only join a trade union whose members are working in the same state—they cannot join in a union whose members are working in any of the states of Peninsular Malaysia even where they work for the same company or organization. Thus, there is a proliferation of employee trade unions.

The number of employee trade unions has grown steadily since the 1960s. As of July 2005 there were 601 employee unions. Nearly all the new unions established from the 1980s onwards are in-house unions. Approximately 36 % of private sector union members belong to in-house unions.⁸ Some parties perceive these unions as being 'yellow' unions or employer-controlled unions. There is no empirical evidence to show whether in-house unions are less able to achieve typical union objectives, such as increased wages and benefits for their members. Certainly, some of the in-house unions are very feisty and have proven that they are able to fight for their members' rights when called upon to do so. On the other hand, the membership of trade unions does not present such a healthy picture. Trade union membership stands at 800,530 as of July 2005.⁹ This means that approximately 8% of the workforce is unionized. If the one million foreign workers are excluded from the workforce, the percentage will be a little higher. The legal position on the right of foreign workers to join a trade union is unclear and so far there has been no test case. Neither the Trade Unions Act nor any other employment legislation specifically excludes foreign or guest workers; thus, it may be assumed that they have the same rights as

⁷ Malaysia has a federal state structure consisting of 13 states and two Federal Territories (Kuala Lumpur and Labuan). Employment law is under the purview of the Federal Government.

⁸ Maimunah Aminuddin, *Malaysian Industrial Relations and Employment Law*, 5th ed., Kuala Lumpur: McGraw Hill, 2005, p. 133.

⁹ Ministry of Human Resources website: www.mohr.gov.my. Accessed on 4 October 2005.

Malaysian citizens to unionize. However, the work permits issued to these employees by the state authorities disallow them from joining any non-government organizations. It is widely assumed that trade unions are included in this category.¹⁰ While the numbers of workers joining trade unions has been increasing, the increase has not kept pace with the growth in the workforce. Trade union density has dropped slightly over the last two decades just as it has in a number of countries, both industrialized and industrializing.¹¹

Certain industries and sectors are more heavily unionized than others. For instance, in the banking sector the density rate may be as high as 70-80% of clerical and non-executive, and non-managerial staff. This is partly due to the organizing strategies of the workers' union, the National Union of Bank Employees (NUBE) with its 30,000 members, even though this union has been facing traumatic problems in the last five years owing to a falling-out between competing leaders. Another sector which is still strongly unionized is the plantation industry. The National Union of Plantation Workers (NUPW) has 35,000 members but it is a mere shadow of what it used to be in its heyday of the 1950s and 1960s. Today, the Union is struggling, given that plantations near urban areas are being converted into housing and commercial property. When the plantation closes, the workers not only lose their jobs but usually lose their home as well, as all estates provide housing to workers. This has led to a number of social problems which have still not been adequately addressed by the authorities. The electronics sector, the largest single contributor to exports in the Malaysian economy, on the other hand can be described as almost union-free. This is largely because of an historical ban on unionization in this sector from the 1970s to the early 1990s.¹² Owing to mounting pressure from the International Labour Organization (ILO), after repeated complaints by the Malaysian Trades Union Congress (MTUC) to the world body, the government decided to permit the workers in this sector to form in-house unions. Some groups of workers were successful in establishing in-house unions fairly quickly but others faced almost insuperable hurdles in the form of union-busting tactics

¹⁰ Many employers are known to inform their foreign workforce that they are prohibited from joining a trade union. Presumably, foreign workers understand the underlying threat—if they attempt to join a union, whether or not this is allowed by law, the employer will not apply to renew their work permit once it expires.

¹¹ According to David G. Blanchflower, union density has dropped dramatically from the 1970s to the 1990s in the USA, Japan, UK and Austria. See David G. Blanchflower, 'The Role and Influence of Trade Unions in the OECD', 1996; www.datmouth.edu. Accessed 20 October 2005.

¹² Elizabeth Grace, *Shortcircuiting Labour: Unionising Electronic Workers in Malaysia*. Kuala Lumpur: Institute for Social Analysis (INSAN), 1990, pp. 14-15

by employers. The tale of Harris Semi-conductor workers' attempt to form a union is told in graphic detail by Mhinder Bhopal.¹³

Not only are some sectors virtually unrepresented by unions, many unions are too small to be effective. For instance 62% of employee unions have less than 500 members.¹⁴ These unions, described by some as 'peanut' unions, do not have the financial resources to do very much for their members. What is preventing workers from joining unions? Apart from obvious reasons such as union-busting tactics used by employers and perhaps the lack of interest of young workers in the concept of unions, both phenomena being found in many countries, the unions themselves blame the legal restraints, which have been in place since the 1950s with very little modification. Without empirical studies, which do not exist, it is almost impossible to unbundle the various reasons for the lack of enthusiasm shown by workers in joining unions. Nevertheless, the legal restraints on membership described earlier certainly play a major role in keeping unions small and ineffective.

The issue of most concern to the union movement today relates to the difficulty in getting recognition from employers, a mandatory pre-requisite for collective bargaining. The Industrial Relations Act, 1967 lays down the procedures by which trade unions may claim recognition from an employer whose workers they represent. Two problems arise time and time again. When a union claims recognition, the employer may challenge whether the union is the right union to represent his workers. The power to make a decision on this matter is in the hands of the Department of Trade Unions. The unions believe that in many cases the decisions made are slow, arbitrary and not in the interests of workers. MTUC submitted a memorandum to the prime minister requesting that 'union recognition be speedily resolved and automatic recognition should be granted to eliminate union busting activities by unscrupulous employers'.¹⁵ The second recognition-related problem is the method used by the Department of Trade Unions to determine whether the union requesting recognition represents a majority of the workers in the organization concerned. The Department either conducts a membership check whereby it compares the names of the union members against the name list of eligible employees supplied by the employer, or it carries out a secret ballot of the workers at their workplace to ascertain the percentage who wish to be represented by the union. A number of court cases have been heard in which one of the parties has objected to the methods used by the Department. This further delays the process of granting recognition to the employees' union.

¹³ Mhinder Bhopal, *US Union Busting in Contemporary Malaysia: 1970-2000*, www.mediapekerja.org. Accessed on 20 October 2005.

¹⁴ Maimunah, *Malaysian Industrial Relations*, p. 131.

¹⁵ MTUC Memorandum to the Prime Minister, 19 January 2004. www.mtuc.org.my.

Furthermore, unions' ability to fight for their members' rights is muzzled tightly by the various restrictions on the right to strike. Strikes are only legal providing a number of procedures and requirements are met. Only union members have the right to strike and then, only after the taking of a secret ballot, the results of which must be submitted to the Department of Trade Unions to ensure that the ballot has been properly administered and counted. A strike can only take place if two-thirds of the workers involved in a trade dispute with their employer agree to the action. Having submitted the ballot papers to the Department of Trade Unions, the workers must wait seven days before striking. In the interim, compulsory conciliation meetings will be called by the Department of Industrial Relations in order to look for potential solutions to the dispute. If no resolution is affected in the seven-day cooling off period, the minister of human resources is empowered to refer the dispute to the Industrial Court for arbitration. As soon as the dispute is referred to the Court, any strike on the matters concerned is illegal. This procedure effectively prevents strikes as can be seen in Table 1 which shows the number of strikes in the last five years.

Table 1
Strikes 2000–2004

YEAR	2000	2001	2002	2003	2004
No. of Strikes	11	14	4	2	3
Mandays Lost	6068	5999	1638	114	3262

Source: Ministry of Human Resources www.mohr.gov.my. Accessed on 20 October 2005.

This system of mandatory pre-strike procedures and compulsory arbitration is designed to achieve economic stability by reducing conflict in the workplace. The workers' right to withdraw their labour has been offset against the need of the country for economic growth which is being brought about by the injection of foreign direct investment. The few strikes which do occur are mostly illegal strikes, organized by workers who are not members of trade unions. The union leadership is too aware of the dire consequences of illegal strike action to encourage such activities. Employers regularly dismiss any employee guilty of taking part in an illegal strike and the Industrial Court is likely to uphold a dismissal in these circumstances. Union members who participate in an illegal strike may lose their right to union membership. The Department of Trade Unions has the right to de-register any trade union whose leadership is found to have organized an illegal strike. Most significantly of all, the Internal Security Act (ISA) which gives the government the right to detain a person without trial if he is considered a threat to the nation's security may be applied. It can be concluded that while workers do have the right to strike, such action is severely curtailed by the procedures required as well as the existence of compulsory arbitration.

Security of Employment

The Industrial Relations Act, 1967 established the Industrial Court, a tribunal tasked to arbitrate trade disputes between unions and employers as well as hear claims that an employee has been dismissed without just cause or excuse. In the absence of statutory law clarifying the rights of employers and employees in relation to termination of employment contracts, the Court has played a major role in laying down guidelines on fair practice. In recent years, with the tremendous growth in the number of claims being filed, complaints about the system are increasing.¹⁶ The system does not allow an employee direct access to the Court. An employee who believes that he has been dismissed without just cause or excuse may file a claim for reinstatement at the nearest office of the Department of Industrial Relations. All employees, that is persons employed under a contract of service, have this right providing they are working in the private sector. Public sector employees do not have access to the machinery provided under the Act; they may, however, file a claim of wrongful dismissal at the High Court.

Once an employee files a claim for reinstatement, one or more conciliation meetings will be held. The Department claims an 80% success rate for its conciliation service. Most claims are settled when the employer agrees to compensate the ex-employee for the loss of his employment and the employee then withdraws his claim. If the dispute is not settled at this stage, the Department will bring the matter to the attention of the Minister of Human Resources who is empowered to make a decision whether to refer the dispute to the Industrial Court for arbitration. The Court that is being inundated with claims of dismissals without just cause or excuse will hold a hearing, on average two years after the original dismissal, although some cases take five to six years before a hearing is conducted. The Court may uphold the dismissal if the employer is able to prove that the dismissal was with just cause and if appropriate procedures were followed prior to the dismissal (whether on the grounds of redundancy, misconduct or poor performance). However, where the Court finds that the employee was dismissed without just cause it will either order the employer to reinstate the employee or it will require the employer to pay a compensation package. Decisions of the Industrial Court are final and are only subject to judicial review by the High Court.

¹⁶ This problem is by no means confined to Malaysia alone. In the UK, the system was revamped in 2004 but criticism of industrial tribunals continues. For example see, Dan Thomas, *Complex Reforms Undermine Employment Tribunals*. www.personneltoday.com. Accessed on 4 October 2005.

The system described above has been in place since the 1970s, but calls for reform and change are becoming more strident. A number of complaints have been made by employers as well as employees' unions and employment lawyers. These complaints will be examined here one by one.

All employees have the right to access the machinery described above. This right is extended to probationary staff whose contracts were terminated at the end of a probationary period, typically between three to six months, when the employer found that they were unsuitable for further employment. In a number of cases, the Court has decided that probationers have the same rights as confirmed staff when it comes to justice at the workplace. They are employees and they must be dealt with fairly. Thus, when their contracts are terminated on the grounds of poor performance, the employer needs to show that he has provided appropriate training and counselling, and that he has warned the employee that if he does not improve he is liable to have his services terminated. Employers are not pleased at the amount of compensation being awarded to probationers, which has been as high as two years' salary and the Court's insistence that pre-termination procedures include written warnings, counselling, and appropriate training, failing which the termination of the probationer is likely to be held to be without just cause or excuse. Employers see these limitations on their right to terminate a probationer as unduly restrictive. They believe that the procedural requirements defeat the purpose of hiring an employee on probation which is that the contract should be easy to terminate by either party if the employment arrangement is not satisfactory.

Both employers and employees have called upon the government to find a way to speed up the process of dealing with claims for reinstatement. The delays are now so bad that many cases are taking up to four to five years before finally being settled through arbitration. Why is there so much delay and what is causing the delays? Many reasons can be found, all of which are partial causes of the slow-down. Firstly, Table 2 illustrates the escalation in the number of cases in the past decade.

The increase in the number of claims for reinstatement reaching the Industrial Court can be attributed to growing awareness amongst employees that they have rights in the workplace. This consciousness, coupled with higher levels of education, leads to more employees making claims. Further, there is a general understanding amongst employees, that as every dismissed employee has the right to make a claim, there is no harm in 'trying their luck'. There is no cost to the employee when he lodges a claim. At best, he will be given compensation by his ex-employer and, if not, he has lost nothing except his time. This attitude would also explain why many employees do not attend Court when called for a hearing of their cases. Between 1999 and 2003, on average, 40% of cases were either withdrawn by

the employee before the Court had a hearing or struck off by the Court because the employee failed to attend court after one or two postponements.

Table 2
Industrial Court Cases under S.20 Industrial Relations Act

Year	No. of Awards Relating to Dismissal	Year	No. of Awards Relating to Dismissal
1991	264	1998	527
1992	242	1999	500
1993	299	2000	507
1994	462	2001	814
1995	439	2002	884
1996	426	2003	871
1997	453	2004	1,737

Source: *The Industrial Court, Malaysia*.

Shortage of staff at the Department of Industrial Relations needed for conciliation and also in the Industrial Court have undoubtedly been a major factor causing the delays. Only in 2004 did the government appoint more staff to deal with the situation. By the year 2005, the number of industrial relations officers had been increased from 60 to 160¹⁷ and the number of Industrial Court chairpersons was also increased, although not in tandem with the increase in the number of industrial relations officers. As a result the number of cases being referred to Court swelled alarmingly—prior to this, these unresolved cases had been languishing in filing cabinets at the Department of Industrial Relations.

Delays at Court in the past may also have been caused by repeated requests by one or more of the parties for postponement due to many reasons. The Court has become more intolerant of such requests given the outcry over delays. Thus, it is now possible to see cases moving through the system a little faster.

However, the most controversial technique introduced to overcome the backlog of cases facing the Industrial Court is mediation. In September 2004 the Court began the practice of offering mediation on a voluntary basis. While there is no provision in the Industrial Relations Act allowing for this practice, neither is there any prohibition on it. The Act gives wide powers to the Industrial Court to resolve disputes. Section 29 of the Act specifies a number of powers given to the Court and ends by stating that, ‘the Court may, in any proceedings before it—generally direct and do all such things as

¹⁷ Yussof Ahmad, President of Industrial Court, ‘Mediation in the Industrial Court’, Talk organized by the Malaysian Association of Human Resource Consultants. Kuala Lumpur, 20 August 2005.

are necessary or expedient for the expeditious determination of the matter before it.’ In the first three months after this system was introduced on a trial basis, some 40% of cases were successfully mediated.¹⁸ The most significant achievement for the mediation process at the Industrial Court was the successful outcome of a trade dispute between the Malayan Agricultural Producers Association (MAPA), the trade union of employers in the plantation industry and the National Union of Plantation Workers (NUPW).¹⁹ Over the years the two unions have failed a number of times to negotiate a new collective agreement and have had to resort to compulsory arbitration by the Court. One of the disadvantages of arbitration of trade disputes relating to the failure to negotiate new terms and conditions of employment is that many times neither party is satisfied with the decisions made by the Court. Mediation can remove this dissatisfaction because the parties are encouraged to make their own decisions rather than have the Court impose a decision on them.

However, some critics of the mediation process adopted by the Industrial Court point out that mediation is a duplication of the conciliation process conducted by the Industrial Relations Department. Further, it has been suggested that there may be an element of undue influence on the parties by chairpersons, who see mediation as a way to speed up the settlement of cases, to accept mediation, even where one or both of the parties would prefer arbitration. In the meantime, the Court intends to continue with this method of resolving the large number of claims for reinstatement as they find it effective in reducing the backlog of cases.²⁰

Another complaint relating to claims for reinstatement under the Industrial Relations Act is that although the law envisaged reinstatement as the primary remedy when an employee had been dismissed without just cause or excuse, the fact is that reinstatement is almost a ‘lost’ remedy. Table 3 shows the outcome of claims for reinstatement heard by the Industrial Court from the year 2000 to 20004.

As can be seen clearly from Table 3, in only 1-2% of the cases heard was the employer ordered to reinstate the claimant. Employers are thus able to dismiss an employee knowing that if the worst comes to the worst they will be required to pay compensation to them—but they would still have achieved their objective of removing them from the organization.

While trade unions are unhappy that reinstatement has become a rare remedy, employers are vocal in criticizing the Court’s evident dislike of numerical flexibility. This can be seen in decisions of the Court in connection with employees hired on fixed-term contracts and claims for reinstatement by

¹⁸ Yussof Ahmad, ‘Mediation in the Industrial Court’.

¹⁹ MAPA/NUPW Palm Oil Employees’ Agreement, 2005. Industrial Court Award No. 1760 of 2005.

²⁰ Personal interview with Yussof Ahmad, Industrial Court President, 22 September 2005.

retrenched workers. The Court recognizes the right of employers to hire workers on a fixed-term contract when there is a genuine need for a temporary employee, but in a number of cases heard by the Court, where employees on fixed-term contracts did not have their contracts renewed, the Court has decided that there was a dismissal without just cause or excuse. As more and more employees are being hired on a fixed-term basis, including workers in mainstream industries, where the work is ongoing, it is only a matter of time until the Court strikes down this trend as an unfair labour practice. The Court has no quarrel with employers who need to reduce their workforce when they have surplus labour but a number of guidelines need to be followed before the Court will accept that such dismissals are with just cause and excuse. If a retrenched worker brings his case to Court, the employer will need to prove to the satisfaction of the Court that the employee was redundant and that the employer followed the procedures laid down in the Code of Conduct for Industrial Harmony, which amongst others requires the employer to downsize based on the criteria of ‘Last-in first-out’.

Table 3

Industrial court decisions on claims of dismissal without just cause or excuse

Outcome	2000 %	2001 %	2002 %	2003 %	2004 %
Upheld	13	6	9	14	7
Consent	24	31	29	22	22
Struck off/Withdrawn	43	45	39	37	58
Reinstatement	2	1	1	2	1
Compensation	14	7	12	13	5
Others	14	7	12	13	5
	100	100	100	100	100

Source: Industrial Court, Malaysia.

Sexual Harassment

Sexual harassment at the workplace was not recognized as a phenomenon worthy of attention in Malaysia prior to the late 1990s. The earliest known study on sexual harassment in the Malaysian context was conducted by an academic, Sabitha Marican,²¹ who examined the extent of sexual harassment amongst public servants in four northern states of Peninsula Malaysia. Her survey showed that more than 50% of the respondents had experienced some form of sexual harassment at work. No further research was carried out on this phenomenon until 2005 when Mohammad Nazari Ismail and Lee Kum

²¹ Sabitha Marican, ‘Gangguan Seksual di Tempat Kerja’ [Sexual Harassment in the Work Place], *Pemikir*, April-June 1999, pp. 27-51.

Chee published the results of their work.²² Based upon a survey in the Klang Valley (Kuala Lumpur and Selangor), they concluded that sexual harassment was rampant in Malaysian workplaces. At highest risk were unmarried, less educated Malay women.

A milestone event took place in 1996 when the Industrial Court handed down the first award directly related to sexual harassment.²³ Industrial Court Award No. 606 of 1996: Jennico Associates and Lilian de Costa received immense media publicity. A director of operations of a hotel which was about to be opened walked off her job and claimed constructive dismissal on the grounds that the chief executive officer, her immediate superior, had on two occasions kissed and tried to fondle her. According to the employee concerned, when she failed to respond to her superior's advances, he started to further harass her by finding fault with her work. The Industrial Court found that; although the employee resigned, she was, in fact, forced to do so by the behaviour of her employer. Although this decision of the Industrial Court was subsequently quashed by the High Court, the media hype and the promotion by various women's groups of the concept that women at work needed more protection than they were getting, caught the attention of the Ministry of Human Resources.

In 1999, partly in response to the publicity given to the above mentioned case, the Ministry decided to issue a Code of Practice for employers in the private sector. The aim of this Code²⁴ is to provide guidelines to employers on the establishment of internal machinery to prevent and eradicate sexual harassment. The task of making employers aware of the importance of implementing the guidelines provided by the Code was assigned to the Department of Labour which offers training programmes to employers and employees on a regular basis for this purpose. Essentially, the Code recommends that employers draft and disseminate a policy statement on sexual harassment, establish a complaint procedure, implement disciplinary action when appropriate, ensure the safety of victims who lodge complaints and provide training to all employees so that they know what sort of behaviour would constitute sexual harassment. The Code was made widely available to employers and interested employees—printed copies were distributed free to large employers and were placed at the offices of the Department of Labour for anyone to pick up. The Code was also put on the

²² Mohammad Nazari Ismail and Lee Kum Chee, 'An Empirical Investigation of Sexual Harassment Incidences in the Malaysian Workplace', *Journal of American Academy of Business*, 7, 1, 2005, pp. 202-7.

²³ There were a few cases that dealt with sexual misconduct of an employee rather than sexual harassment. See, Industrial Court Award No. 98 of 1993, 378 of 1994, and 249 of 1996.

²⁴ 'Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace', Ministry of Human Resources, Malaysia.

Ministry's website (www.mohr.gov.my) where it can be downloaded by any interested party.

Needless to say, the official adoption of this Code by companies has been rather disappointing. The Department of Labour estimated in early 2005 that out of 400,000 registered workplaces, only 624 have an in-house mechanism to tackle sexual harassment in the workplace.²⁵ However, it may be that many employers do not see the need to openly endorse the Code as they already have suitable mechanisms and procedures in place which are capable of dealing with instances of alleged sexual harassment at work. As a result of the lukewarm response to the Code by employers, a group of women's non-government organizations (NGOs) calling themselves the Joint Action Group Against Violence Against Women (JAG)²⁶ are now recommending that an Act of Parliament be passed for the purpose of making sexual harassment an offence. To this end, in 2001 they drafted and submitted to the Ministry of Human Resources a Bill entitled Sexual Harassment Bill 2001. The Bill prohibits sexual harassment not only within the workplace but also in other high-risk situations such as educational institutions where there may be harassment of potential applicants or students by officers of the institution, and public sector organizations whereby members of the public require service, and so on. The Bill attempts to make it compulsory for employers to take steps to create a sexual harassment free work environment. These steps include preparation of a written policy on sexual harassment, and the appointment of a committee to implement the company's policy on sexual harassment. Further, the Bill requires the appointment of a dedicated Directorate and Tribunal to deal with complaints of sexual harassment. It is not very likely that this Bill will be put to Parliament any time soon. The government is unlikely to want to introduce legislation which involves significant cost considerations and to a certain extent overlaps the jurisdiction of the existing Industrial Court. Employers are also likely to resist the introduction of further employment legislation which would add complications to an already complex legal environment. Above all else, having an external body to handle employee complaints of sexual harassment may not be effective in reducing the number of cases. Claims of sexual harassment are difficult to prove in most instances because there is no evidence to back up the victim's complaint. Having a special court to handle sexual harassment will not make this problem disappear, it will only add cost to all parties involved. Malaysia is also highly unlikely in the

²⁵ *The Star*. 23 February 2005.

²⁶ The group comprises the Women's Crisis Centre, Penang, the Women's Development Centre, the Women's Aid Organization, All Women's Action Society, Sisters in Islam, the Women's Section of the Malaysian Trades Union Congress, Persatuan Sahabat Wanita, Selangor and the Women's Candidacy Initiative.

near future to introduce legislation which in some countries is tied to general laws prohibiting discrimination at the workplace.

Alternatives to the suggestions laid down in the draft Bill include requiring companies to include their mechanism for dealing with sexual harassment in their collective agreements. To enforce this requirement, an amendment would be needed to the Industrial Relations Act of 1967 which outlines the procedures for collective bargaining, and lists the items which are considered management prerogatives and cannot be included in an agreement, except where both employer and trade union agree on general procedures. The Act does not presently stipulate any compulsory items which must be included in collective agreements. As discussed above, only 8-9% of workers are union members (half of whom are in the public sector where collective bargaining is not permitted), although a larger percentage of workers will be covered by a collective agreement as each agreement covers not only union members but all workers in an enterprise eligible to join the union which is party to the agreement. This means that inserting appropriate clauses in a collective agreement relating to sexual harassment will only protect those workers who are unionized. However, employers in unionized companies are more likely to already have in place effective disciplinary procedures to deal with misconduct, including sexual harassment.

Another possibility is to add regulations to the Occupational Safety and Health Act of 1994 which already requires employers to draft and disseminate to all workers a policy on safety and health. Another regulation could be included in this Act making it compulsory for employers to have a policy on sexual harassment as recommended in the Code of Practice. At the moment the Department of Occupational Safety and Health is probably not the most appropriate party to ensure proper procedures are in place to prevent and eradicate sexual harassment as most of their officers are engineers more skilled in identifying workplace hazards and analyzing causes of accidents rather than advising on sexual harassment. Still, this weakness could be overcome by the appointment of special officers to the Department whose responsibility would be to ensure employers comply with the law.

Conclusion

Undoubtedly, Malaysia is in a state of industrial harmony, at least in terms of overt industrial action, but this may have been achieved at the expense of freedom of association of workers. Increased freedom is not on the immediate horizon, nor are major changes to the existing industrial relations system. The trade union movement is likely to continue plodding along in the short term, but unless it can find a way to buck the world-wide trend of lessening interest in union membership, the movement may fade gently away.