

# The Law of Sexual Harassment in China\*

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## I. INTRODUCTION

Sexual harassment involves unwanted behavior of a sexual nature. Men have subjected women, because of their inferior position in Chinese society, to such behavior for centuries.<sup>1</sup> Sexual harassment presents yet another example how men in positions of power (physical, political, and economic) coerce women and violate their bodily integrity.<sup>2</sup> The law in this area has developed largely through the work of human rights activists and feminist movements. After the Second World War and following the establishment of the UN Charter and the Universal Declaration of Human Rights, the prevalent idea was that there existed a set of universal human rights reinforcing the principles of gender justice, equality, and freedom.<sup>3</sup> Legislation to regulate sexual harassment is a relatively new phenomenon. China enacted its first anti-sexual harassment law in 2005.<sup>4</sup>

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<sup>1</sup> See generally William L. Parish, Aniruddha Das & Edward O. Laumann, *Sexual Harassment of Women in Urban China*, 35 ARCHIVES SEXUAL BEHAV. 411 (2006), available at <http://www.springerlink.com/content/6041630566j8muk1/fulltext.pdf>.

<sup>2</sup> See ROSEMARIE SKAINE, *POWER AND GENDER: ISSUES IN SEXUAL DOMINANCE AND HARASSMENT* (1996); see also CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 151-54 (1979).

<sup>3</sup> See Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89 (1996).

<sup>4</sup> Law on the Protection of Women's Rights and Interests (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28 2005, effective Dec. 1, 2005) art. 40 (P.R.C.), available at <http://www.wcwonline.org/pdf/lawcompilation/TheRevisedLawProtection.pdf>; see also, CONG.-EXECUTIVE COMM'N ON CHINA, ANNUAL REPORT, 2005, at 67-70 (2005), available at <http://www.cecc.gov/pages/annualRpt/annualRpt05/index.php>.

Passing legislation, however, is not enough unless the legislation provides a mechanism to give relief in sexual harassment cases. Emphasis on technicalities or procedures should not get in the way of making appropriate awards of compensation, and compensation must be such that wrongdoers and like-minded persons are deterred. Our contention is that neither judicial decisions nor the recent legislation in China can make any difference to the plight of women if judges still suffer from the hangover of China's traditional society, which accords women an inferior position. As far as legislation on sexual harassment is concerned, it is singularly deficient in many respects. Chinese legislators, it seems, have overlooked the criticisms concerning the legislative models of common law countries. The focus of the paper is to critically examine the attributes and deficiencies of Chinese legislative and judicial approaches to the problem of sexual harassment. First, this paper deals with the position of women in Chinese society. Second, it examines judicial decisions on sexual harassment in China made before the enactment of China's 2005 sexual harassment legislation. Third, it examines the 2005 legislation and the remedies that are provided to victims of sexual harassment. Finally, the paper offers some comments and suggestions on how to make improvements to the sexual harassment laws in China.

## II. SOCIOLOGICAL BACKGROUND

In China, women occupy a subordinate position to men. They are viewed as the root cause of all evil (*nvren huoshui*).<sup>5</sup> For example, if a husband has a mistress, it is the mistress's fault for being attracted to him, not the fault of the husband. If a girl is sexually harassed, it is her fault, not the harasser's fault. Numerous arguments are used to protect the harasser, such as that the girl was dressed provocatively, spoke in a manner encouraging sexual advances, or made bodily gestures or movements that incited the harasser.<sup>6</sup> The use of force on women in China is rooted in its culture of Confucianism.<sup>7</sup> The Confucian principles dictate that a woman has to obey her father before marriage, her husband after the marriage, and her son after her husband's death.<sup>8</sup> Women have no sexual rights in China, but must bear

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<sup>5</sup> This is an old Chinese saying. According to the MODERN CHINESE DICTIONARY (Xiandai hanyu dacidian), "huoshui" refers to women who seduce men and destroy things. See MODERN CHINESE DICTIONARY 2536 (Chinese Dictionary Press 2000).

<sup>6</sup> Parish, Das & Laumann, *supra* note 1, at 413.

<sup>7</sup> Eunice Wong, Chinese Cultural Perspectives on Sexual Violence, Immigrant Women's Support Service Forum Papers, [www.iwss.org.au/public/forumpapers/china.pdf](http://www.iwss.org.au/public/forumpapers/china.pdf) (last visited June 30, 2009).

<sup>8</sup> KEITH PRATT, SEX AND AESTHETICS IN TRADITIONAL CHINA 3-4 (Michael Dillion ed., 1997); see Delia Davin, *Women in the Countryside of China*, in WOMEN IN CHINESE SOCIETY 243

children, especially sons. Traditionally speaking, a rape victim was expected to resist sexual assault, but she was not allowed to use much vigor and injure the rapist. If she injured the rapist, she could be held criminally liable.<sup>9</sup> Women are seen as an extension of men, as their servants, and as potential attractive objects of pleasure for men.<sup>10</sup> Chairman Mao Zedong sought to change this position, and advocated for the equality of men and women declaring, "women hold up half the sky."<sup>11</sup> Yet the opening up of China and its march towards a market economy created further opportunities for the exploitation of women. A survey on April 8, 2007 found that 80% of the respondents experienced sexual harassment of some kind or the other.<sup>12</sup> Another survey found that 84% of single females below the age of thirty have suffered from sexual harassment, and 77% of those who were sexually harassed were twenty-two to twenty-five years old.<sup>13</sup> Such harassment occurred in workplaces, public buses, elevators, trains, bars, discos, Internet bars, hospitals, and on mobile phones. Wrongdoers have not only been strangers, ex-husbands, teachers, doctors, and friends, but also their colleagues and immediate bosses. Most incidents of sexual harassments have been in workplaces.<sup>14</sup> A Chinese Health and Family Life Survey of 3,821 women between the ages of twenty and sixty-four found that 15% of urban women<sup>15</sup> and 12.5% of all women were victims of sexual harassment.<sup>16</sup> In 2004, 84% of sin-

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(Margery Wolf & Roxane Witke eds., 1975); see also, JULIA KRISTEVA, ABOUT CHINESE WOMEN (Anita Barrows trans., 1977) (1941).

<sup>9</sup> This was the situation in China before 1997. In that year the Criminal Law was amended to provide that a rape victim may act in defence against an on-going rape and shall not bear any criminal responsibility if the self-defence causes injury or death to the rapist. Criminal Law of the People's Republic of China, art. 20(3), available at <http://www.baliprocess.net/Files/Legislation/A-C/ChinaCriminalLaw.pdf>.

<sup>10</sup> Yang Duanhong & Lu Chun, Preliminary Research on the Establishment of a Harmonized Society and Main Stream of Social Sexual Distinction, [http://www.humanrights.cn/cn/zt/qita/rqzz/2008/04/t20081028\\_383923.htm](http://www.humanrights.cn/cn/zt/qita/rqzz/2008/04/t20081028_383923.htm) (last visited June 30, 2009).

<sup>11</sup> President Mao Zedong publicly made this statement in 1968. See *Memorizing Mao Zedong and Women Hold Up Half the Sky*, [http://www.gjgy.org/Article\\_Show.asp?ArticleID=4994](http://www.gjgy.org/Article_Show.asp?ArticleID=4994) (last visited June 30, 2009).

<sup>12</sup> Dai Xiaolin, *Investigation Shows that 80% of Chinese Women Suffered Sexual Harassment* (*Diancha Xianshi Zhongguo 80% Nuxing Cengjing Zaoshouguo Xingsaorao*), <http://jxgdw.cn/jxgd/news/fz/userobject1ai710736.html> (last visited June 30, 2009).

<sup>13</sup> M. Ulric Killion, *Post-WTO China: Quest for Human Right Safeguards in Sexual Harassment Against Working Women*, 12 TUL. J. INT'L & COMP. L. 201, 204 (2004).

<sup>14</sup> *Id.*; see DELIA DAVIN, WOMEN-WORK: WOMEN AND THE PARTY IN REVOLUTIONARY CHINA 155 (1976).

<sup>15</sup> Parish, Das & Laumann, *supra* note 1, at 411; Chen Xinxin, *Sexual Harassment — A Matter of Social Concern*, CHINA TODAY, Dec. 2003, <http://www.chinatoday.com.cn/English/p30.htm>.

<sup>16</sup> Parish, Das & Laumann, *supra* note 1, at 411.

gle women under the age of thirty suffered from sexual harassment.<sup>17</sup> The most common type of harassment is by touching the victim's private parts. The second most prevalent type of harassment is sending lewd messages via Internet or telephone. The Chinese Academy of Social Sciences Survey states that 48% of women had experienced harassment in the form of obscene jokes or insinuations from their male colleagues; 13% of the women surveyed by the Academy said they were expected to grant sexual favours in exchange for reemployment, promotion, or other benefits; and 26% had been subjected to physical advances in public places.<sup>18</sup> Another type of harassment is secretly viewing a woman while she is in a state of undress or while scantily dressed.<sup>19</sup>

Despite the increasing number of employed women in China, the workplace continues to be the environment where women are most often sexually harassed. One may expect that with so many women in the workforce, the incidents of sexual harassment would go down considerably, but this is not the case.<sup>20</sup> By 1998, women comprised 45.2% of the workforce.<sup>21</sup> This employment rate of women is much higher than the government target of 40%.<sup>22</sup> A national survey of 8,000 working women reports that 79% of respondents experienced sexual harassment.<sup>23</sup> Women are more frequently the targets of sexual harassment in private and foreign enterprises than in state-owned enterprises.<sup>24</sup>

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<sup>17</sup> Killion, *supra* note 13, at 204.

<sup>18</sup> Chen Xinxin, *supra* note 15.

<sup>19</sup> Behind a Sexual Harassment Case: Patient, Unconcerned and Shifting Responsibility to Others, [http://news.xinhuanet.com/focus/2008-02/18/content\\_7493811.htm](http://news.xinhuanet.com/focus/2008-02/18/content_7493811.htm) (last visited June 30, 2009). Such incidents happen almost everywhere, not only in China, as forms of peeping are found in every society. For example, a woman was photographed from beneath the door by an attendant in a sports apparel store in Mumbai, India while she was trying on clothes in the store's changing room; in fact the attendant got her "nearly naked." Kumkum Chada, *Beware of Peeping Toms in Trial Rooms*, HINDUSTAN TIMES, June 12, 2008, available at <http://www.hindustantimes.com/StoryPage/StoryPage.aspx?sectionName=NLetter&id=f8aca4cb-877a-43c4-a331-a7df71f5f4f1&&Headline=Beware+of+peeping+Toms+in+trial+rooms>.

<sup>20</sup> Xinhua, *China Amends Law to Ban Sexual Harassment*, CHINA VIEW, June 26, 2005, [http://news.xinhuanet.com/english/2005-06/26/content\\_3139484.htm](http://news.xinhuanet.com/english/2005-06/26/content_3139484.htm). A study by the Chinese Academy of Social Sciences reveals that 40% women in private or foreign firms and 18% women in state-owned companies encounter sexual harassment. *China Outlaws Sexual Harassment*, BBC NEWS, Aug. 28, 2008, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/4192672.stm>.

<sup>21</sup> Killion, *supra* note 13, at 205.

<sup>22</sup> The Labor Rights, Personal Rights, and Other Rights of Chinese Women Have Received Vigorous Protection (Mar. 7, 2007), <http://weijingdog.lingd.net/article-48383-1.html>.

<sup>23</sup> Xinhua, *supra* note 20; see also Chen Xinxin, *supra* note 15.

<sup>24</sup> Xinhua, *supra* note 20.

Most of the victims of sexual harassment suffer in silence: only a few use legal means to voice their grievances.<sup>25</sup> This lack of reporting occurs for many reasons. Some victims fear the stigma of reporting sexual harassment to a third person, to the authorities, or to their husbands.<sup>26</sup> Some sexually harassed women were found to be so naive that they did not even understand the nature of the wrong perpetrated by their male counterparts, much less wanting to report it.<sup>27</sup> Some do not want to talk about their sexual harassment because they are afraid that others would think that their own frivolous behavior might have contributed to it.<sup>28</sup> Some are unwilling to report their harassment because they fear that it would lead to embarrassment and loss of face.<sup>29</sup> Some do not report their sexual harassment because they fear a counter-attack by the harasser in the form of a defamation suit.<sup>30</sup> Some are also afraid that reporting sexual harassment of their superiors would adversely affect their employment and the prospects of their promotion.<sup>31</sup> Occasionally, women have left their jobs to prevent themselves from being sexually harassed.<sup>32</sup>

### III. JUDICIAL DECISIONS

There have been over ten reported sexual harassment cases where women have made civil claims for compensation under the General Principles of the Civil Law of the People's Republic of

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<sup>25</sup> Liu Xiaoli, *Sexual Harassment, A Topic Hard to Mention by Females*, <http://www.police.com.cn/Article/anquan/nxaq/200505/2032.html> (last visited June 30, 2009); see also Zeng Jinsheng, *Sexual Harassment: When Not Be Silent?*, <http://past.people.com.cn/GB/paper83/9386/869576.html> (last visited June 30, 2009).

<sup>26</sup> *No Sexual Harassment Case Does Not Mean That There Exits No Sexual Harassment, Female Victims Face Many Difficulties to Protect Their Rights*, HEILONGJIANG DAILY NEWS, Oct. 9, 2005, available at <http://heilongjiang.dbw.cn/system/2005/10/09/050150720.shtml>.

<sup>27</sup> *Survey on Sexual Harassment*, WENKEE NET, Aug. 15, 2006, available at <http://www.wenkee.com/edpforum/viewthread?thread=23076>; see also *Sexual Harassment Needs More Attention in China: Survey*, Xinhua Gen. News Serv., July 25, 2000 (LEXIS, Xinhua General News Service File).

<sup>28</sup> Qiu Yuping, *First Sexual Harassment Case in Beijing, Refuse to Be a Silent Sheep*, <http://news.sina.com.cn/s/2003-04-04/0122980437.shtml> (last visited June 30, 2009).

<sup>29</sup> Killion, *supra* note 13, at 204.

<sup>30</sup> *Id.* at 208.

<sup>31</sup> In the first sexual harassment case heard in Beijing, the victim claimed that, as a result of her claim, the manager accused of harassing her used his connections to interfere with her job prospects. See Chen Xinxin, *supra* note 15.

<sup>32</sup> *Working Units Must Take Measures to Avoid Sexual Harassment Cases*, XINHUA DAILY NEWS, June 27, 2005, available at [http://news.xinhuanet.com/legal/2005-06/27/content\\_3141715.htm](http://news.xinhuanet.com/legal/2005-06/27/content_3141715.htm).

China.<sup>33</sup> Among those, claimants succeeded in only a few. Most of these successful cases were decided before the provision relating to sexual harassment was formally adopted by the Law of the People's Republic of China for the Protection of Women's Rights and Interests (Protection of Women's Rights Law).<sup>34</sup>

In the first successful case, the Sichuan case of 2002,<sup>35</sup> the defendant forcibly embraced and hugged the claimant, causing her mental distress.<sup>36</sup> The defendant was ordered to pay 2,000 RMB as damages and tender an apology to the claimant.<sup>37</sup> In the second winning case, the Wuhan case of 2003,<sup>38</sup> the defendant, a school director, tried to seduce a teacher. He followed her into her room, kissed her, and touched her private areas.<sup>39</sup> Over ten law firms turned down the victim's case because they believed that she could not win, and that the courts would probably not accept the case.<sup>40</sup> Eventually, the plaintiff was able to sue, claiming, *inter alia*, damages for her sexual harassment and distress and also requested the defendant to publicly apologize for his reprehensible conduct.<sup>41</sup> The Court of First Instance held that the defendant's conduct was tortious and improper, and similar to the Sichuan case, ordered the defendant to pay 2,000 RMB as damages for her mental distress and to make a public apology.<sup>42</sup> In the

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<sup>33</sup> Ten Big Sexual Harassment Cases in China, [http://blog.sina.com.cn/s/blog\\_49b457eb010006vh.html](http://blog.sina.com.cn/s/blog_49b457eb010006vh.html) (last visited June 30, 2009); see also General Principles of the Civil Law of the People's Republic of China, arts. 119-120 (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), available at [http://www.chinaproject.de/Recht\\_Steuern/General%20Principles%20of%20the%20Civil%20Law%20of%20the%20People%27s%20Republic%20of%20China.htm](http://www.chinaproject.de/Recht_Steuern/General%20Principles%20of%20the%20Civil%20Law%20of%20the%20People%27s%20Republic%20of%20China.htm).

<sup>34</sup> This legislation was first adopted on April 3, 1992. It was amended on August 28, 2005 to prohibit sexual harassment.

<sup>35</sup> Courts in China do not publish their opinions like their counterparts in the United States. There is no formal case reporting system in China either in English or Chinese.

<sup>36</sup> The First Sichuan Sexual Harassment Case Was Finally Decided and Defendant Apologized and Paid 2000 Yuan (Aug. 9, 2003), <http://news.sina.com.cn/s/2003-08-09/10271509693.shtml>.

<sup>37</sup> *Id.*

<sup>38</sup> *The First National Sexual Harassment Case Where the Plaintiff Won*, XINHUA NEWS AGENCY, June 18, 2003, available at <http://life.sohu.com/05/06/article210210605.shtml>.

<sup>39</sup> *Id.*

<sup>40</sup> *Record of China's Sexual Harassment Lawsuits*, SHANGHAI STAR, Mar. 24, 2005, available at <http://app1.chinadaily.com.cn/star/2005/0324/fo6-2.html>.

<sup>41</sup> *Id.*

<sup>42</sup> *The First National Sexual Harassment Case Where the Plaintiff Won*, *supra* note 38. However, the Court of Second Instance ruled that only apology was sufficient, but no monetary remedy should be given, as there existed no serious consequence. See *The First National Sexual Harassment Case Where the Plaintiff Won: Did the Court Indulge Sexual Harassment by Not Allowing Monetary Remedy?*, <http://www1.peopledaily.com.cn/GB/shehui/1063/2166706.html> (last visited June 30, 2009).

third case, the Beijing case of March 2004,<sup>43</sup> the defendant sent lewd sexual messages to the claimant. The court awarded 1,000 RMB to the claimant for her sexual harassment.<sup>44</sup> The Beijing case is significant because the court outlined four requirements for the claimant to establish to claim damages for sexual harassment.<sup>45</sup> First, the conduct of the defendant must be unwelcome to the claimant.<sup>46</sup> Second, the apparent object of the harassment must be sexual.<sup>47</sup> Third, there must be some overt act, such as the use of sexual language, gestures, or other visual signals implying a demand for sexual favors.<sup>48</sup> Fourth, the conduct must violate the claimant's dignity and freedom of her person.<sup>49</sup>

We now turn to the other cases where the claimants failed in their claims against the defendants. In the Xi'an case of 2001,<sup>50</sup> the first sexual harassment case to ever come before a court of law in China, a female employee sued her company manager for sexual harassment. The employee was working in a state-owned enterprise and the defendant was head of the enterprise.<sup>51</sup> She alleged that beginning in 1994, her manager had been deliberately touching her and promising her a better job in return, and that on one occasion he asked her to go to a hotel room to spend time with him.<sup>52</sup> The claimant objected to the defendant's sexual advances, but none of her colleagues were willing to come forward as a witness.<sup>53</sup> The witness who came forward said that he did not actually see any sexual advances by the defendant, but that on one occasion, when the claimant and defendant were in the defendant's office, he heard her shouting, "What are you doing? Don't do that."<sup>54</sup> The claimant also argued that other colleagues who had direct knowledge of the events would not

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<sup>43</sup> Li Qing, *Message Harassment is Also a Sexual Harassment, the First Beijing Message Harassment Case Has Been Decided*, XINHUA NEWS AGENCY, Mar. 12, 2004, available at [http://news.xinhuanet.com/newscenter/2004-03/12/content\\_1363132.htm](http://news.xinhuanet.com/newscenter/2004-03/12/content_1363132.htm).

<sup>44</sup> Ten Big Sexual Harassment Cases in China, *supra* note 33.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> China's First Sexual Harassment Case Rejected and Plaintiff Decided to Appeal (Jan. 2, 2002), <http://big5.southcn.com/gate/big5/news.southcn.com/community/jrgz/200201020097.htm>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

testify due to fear of reprisal by the defendant.<sup>55</sup> The claimant's evidence was rejected as being inconclusive. An appeal to the Xi'an Intermediate People's Court was also met with the same fate.<sup>56</sup> The claimant's lawyer expressed disappointment, and described the decision as irresponsible.<sup>57</sup>

In the Kunming case of 2002, the claimant alleged that the defendant, her supervisor, used lewd language to address her and frequently touched her private parts.<sup>58</sup> The claimant first complained to an investigation committee, which looked into the victim's complaint, but her claim was ultimately rejected. It held that what was done by the defendant "were mere jokes" and not serious enough to warrant any action.<sup>59</sup> The complainant then sued the defendant, but the court dismissed her action for lack of evidence.<sup>60</sup>

In the Guiyang case of 2002, the claimant alleged that her company director sexually molested and insulted her on a regular basis in his office.<sup>61</sup> Because there was no direct evidence to support the claimant's allegations, she lost the case.<sup>62</sup>

In the Beijing case of 2003, the claimant's case failed because all direct evidence was contained in electronic documents, which the court refused to accept.<sup>63</sup> In the Beijing case of June 2004, the claimant alleged the defendant falsely asserted that she offered sexual favors to three film directors to get roles in films and quarreled with the directors' wives.<sup>64</sup> When she did not succeed in the Court of First Instance, she appealed. In September 2006, the People's Intermediate Court Number one of Beijing affirmed the decision of the Court of First Instance.<sup>65</sup>

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<sup>55</sup> *China's First Sexual Harassment Case Rejected*, PEOPLE'S DAILY, Dec. 25, 2001, available at [http://english.peopledaily.com.cn/200112/25/eng20011225\\_87414.shtml](http://english.peopledaily.com.cn/200112/25/eng20011225_87414.shtml); see *Unwanted Advances*, SHANGHAI STAR, Mar. 24, 2005, available at <http://app1.chinadaily.com.cn/star/2005/0324/fo6-1.html>.

<sup>56</sup> Killion, *supra* note 13, at 205.

<sup>57</sup> SHANGHAI STAR, *supra* note 55.

<sup>58</sup> Ten Big Sexual Harassment Cases in China, *supra* note 33.

<sup>59</sup> *Id.*

<sup>60</sup> The authors have tried to locate direct sources to support this conclusion. Unfortunately, only indirect source can presently be obtained. See, e.g., Li Yongqin, *Protection of Women's Personal Right Under the Perspective of a Harmonized Society* (Jan. 17, 2008), <http://www.gy.yn.gov.cn/Article/sflt/fglt/200801/8245.html>.

<sup>61</sup> Ten Big Sexual Harassment Cases in China, *supra* note 33.

<sup>62</sup> *Id.*

<sup>63</sup> XINHUA NEWS AGENCY, *supra* note 38.

<sup>64</sup> Ten Big Sexual Harassment Cases in China, *supra* note 33.

<sup>65</sup> *Zhang Jue Failed Again in Her Appeal and Is Ready to Quit Her Job as Actress*, CHINA NEWS.COM, Sept. 12, 2006, available at <http://www.chinanews.com.cn/yl/yrmt/news/2006/09-12/788460.shtml>.



In the Shanghai case of 2005, a working woman went to an orthopedic surgeon who, during the course of her physical examination, touched her breasts and other private areas.<sup>66</sup> At the time the surgeon did the physical examination, he was not wearing hand gloves.<sup>67</sup> She alleged the conduct of the surgeon amounted to sexual harassment, and that the harassment caused her psychiatric illness.<sup>68</sup> The trial court, nevertheless, found in favor of the surgeon, holding that the examination was within the scope of his work.<sup>69</sup>

The claimant in the Chongqing case of 2006 was a schoolteacher. She received emails from the school's headmaster, which mentioned his love for her.<sup>70</sup> The claimant alleged that those emails amounted to sexual harassment.<sup>71</sup> Unfortunately, because she responded to some of those emails, her correspondences with the headmaster indicated the relationship was consensual and that she was not sexually harassed.<sup>72</sup> The claimant also failed at the appellate court.<sup>73</sup>

#### IV. THE LEGISLATION RELATING TO SEXUAL HARASSMENT

A national law against sexual harassment was eventually passed in the year 2005. This law is a part of the Protection of Women's Rights Law.<sup>74</sup> This law seeks to foster gender equality, which became one of China's basic national policies after the establishment of the People's Republic of China in 1949. The Protection of Women's Rights Law prohibits sexual harassment of women by men, and states that when a woman is subjected to sexual harassment, she has the right to report the matter to the authorities.<sup>75</sup> It further declares that sex-

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<sup>66</sup> *The First Case of Sexual Harassment in Shanghai Brought to Appellate Court*, XINHUA NEWS AGENCY, July 20, 2006, available at [http://news.xinhuanet.com/legal/2006-07/20/content\\_4860254.htm](http://news.xinhuanet.com/legal/2006-07/20/content_4860254.htm).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* The authors have tried to find out the final decision of the Appeal Court. However, no relevant source is available at this stage.

<sup>70</sup> For detailed information, see Yang Shengquan, *Female Teacher of Chongqing Primary School Sue Headmaster of the School and Evidence Has Been Exposed*, XINHUA NEWS AGENCY, Sept. 29, 2006, [http://www.ln.xinhuanet.com/zxsf/2006-09/29/content\\_8166801.htm](http://www.ln.xinhuanet.com/zxsf/2006-09/29/content_8166801.htm).

<sup>71</sup> *Id.*

<sup>72</sup> Ten Big Sexual Harassment Cases in China, *supra* note 33.

<sup>73</sup> See also *Chen v. Taramus Rus*, [2001] 3 H.K.L.R.D. 541, 543 (C.A.) (where the court adopted the same approach).

<sup>74</sup> This legislation was first adopted on April 3, 1992. It was amended on August 28, 2005 to prohibit sexual harassment.

<sup>75</sup> Law on the Protection of Women's Rights and Interests (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28 2005, effective Dec. 1, 2005) art. 40, (P.R.C.), available at <http://www.wcwonline.org/pdf/lawcompilation/TheRevisedLawProtection.pdf>.

ual harassment of a woman violates public security management regulations, and that wrongdoers can be subjected to administrative penalties as well as civil claims brought against them in a court.<sup>76</sup>

Sexual harassment is not defined in the Protection of Women's Rights Law. However, some provincial laws define sexual harassment. In Shanxi Province, the Measures to Implement the Protection of Women's Rights Law were enacted to strengthen that law.<sup>77</sup> They provide that "any unwanted sexual advances aimed at women, showing pornographic material to women, or making sexual requests to women in verbal, written, graphic, electronic, or physical form constitutes sexual harassment."<sup>78</sup> Under this local law, whistling or ogling at a woman in a sexually suggestive manner or staring at her private parts is also sexual harassment.<sup>79</sup>

In Shanghai, a draft bill has been submitted to the city's legislature to forbid sexual harassment.<sup>80</sup> This draft bill states that it is illegal to make unwanted sexual advances, such as groping women in public, the use of sexually suggestive language, whether in jest or otherwise, and sending text messages or explicit sexual pictures.<sup>81</sup> The draft bill provides that women have the right to report their sexual harassment to relevant organizations and claim damages.<sup>82</sup>

Interestingly, in Sichuan Province, a local law specifically prohibits male political leaders from employing female secretaries.<sup>83</sup> Where a male political leader does allow his subordinates to have female secretaries, not only are such subordinates liable for sexual harassment, but the male political leader is also liable.<sup>84</sup> The Sichuan law provides for administrative penalties for the breach of its provisions.<sup>85</sup> This law reinforces the traditional Chinese viewpoint of *hong yan hou shui* — that once a female secretary is hired for a male

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<sup>76</sup> *Id.* art. 58. In China, national legislation usually sets out general principles while detailed implementing rules and regulations are made by administrative bodies or local governments. See generally ALBERT HONGYI (HUNG-YEE) CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA (3d ed. 2004).

<sup>77</sup> *Think Twice Before You Whistle at, or Ogle, Women*, CHINA DAILY, Dec. 1, 2006 (LEXIS, China Daily File).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Legislators Specify Forms of Sexual Harassment*, XINHUA NEWS AGENCY, Oct. 26, 2006, available at <http://www.china.org.cn/english/GS-e/186207.htm>.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Huang Xianming, *Sichuan Issues New Rules Prohibiting Employment of Female Secretaries by Men Holding Leadership Positions*, HUAXI CITY NEWSPAPER, July 14, 2003, available at <http://news.sina.com.cn/c/2003-07-14/10431338407.html>.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

leader, he may become easily attracted to her. The legislation, however, is *prima facie* discriminatory in that it denies equal employment opportunities to women by law.

## V. IMPACT OF CHINESE JUDICIAL DECISIONS AND LEGISLATION

The sexual harassment cases filed by women against men over the last few years show that some women are now conscious of their rights to freedom of their person and their bodily integrity and that some women will not tolerate acts of sexual harassment. It is also a remarkable achievement for China, which is still a male dominated society, to outlaw sexual harassment against women by legislation, making it both a criminal offense as well as a civil wrong.

New judicial and legislative trends in China are impacting the thinking of companies, especially joint ventures doing business in China.<sup>86</sup> In Shanghai, one company has included a clause in its employment contract providing details of how to prevent sexual harassment.<sup>87</sup> This would suggest, in our view, that this company considers that sexual harassment is a wrong and those found guilty of sexual harassment should be subjected to disciplinary action by the company. Companies in Nanjing have incorporated similar clauses into their employment contracts as well.<sup>88</sup>

In Beijing, universities are holding classes for undergraduate students to make them aware of the prevalence of the sexual harassment and how to combat it. The advice given to female students is that: (1) they should not dress in provocative or revealing clothes and should avoid visiting crowded or empty places; (2) when visiting unfamiliar places, they should be wary of strangers following them; (3) they should not be unduly carried away by the benevolence of strangers or even those who are known to them, and they should suspect that there could be a hidden agenda or motive underlying such generosity; (4) they should not visit discos or bars; and finally, (5) they should, if sexually harassed, scream and make a scene to attract attention.<sup>89</sup>

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<sup>86</sup> Parish, Das & Laumann, *supra* note 1.

<sup>87</sup> *Sexual Harassment Clauses in Employment Contract in Shanghai*, WUHAN EVENING NEWS, Oct. 19, 2003, available at <http://www.southcn.com/news/community/shzt/sexualharassment/suggestion/200310271076.htm>.

<sup>88</sup> *Id.*

<sup>89</sup> De Hong Luo, *Courses on Sexual Harassment Prevention Offered by Beijing Universities*, BEIJING MORNING NEWS, Sept. 15, 2005, available at <http://www.southcn.com/news/community/shzt/sexualharassment/office/200509150187.htm>; see also Wong Kwok Mui v. Lee Yuen Tim, 9 D.C.E.O. 1999, available at [http://legalref.judiciary.gov.hk/lrs/common/ju/ju\\_body.jsp?DIS=21750&AH=&QS=&FN=&currpage=](http://legalref.judiciary.gov.hk/lrs/common/ju/ju_body.jsp?DIS=21750&AH=&QS=&FN=&currpage=).

Some legal experts suggest that an employment contract should contain the following provisions: (1) colleagues should respect each other and pay attention to the use of proper language and avoid jokes that will cause a strong reaction from women; (2) a person must not stay alone with a member of the opposite sex in a private place, but if they have to do so because of the nature of their work, the two persons must keep at least one meter distance between them and dress properly; and (3) violators of these rules shall be punished by way of a warning or a fine.<sup>90</sup> Even though these provisions are not well drafted and could be further improved, they highlight the fact that attempts are being made to prevent sexual harassment in the workplace.

However, judicial ingenuity cannot make much headway in China because of the nature of China's legal system. Nevertheless, the judicial approaches to dealing with sexual harassment cases are a good starting point, and the new pieces of legislation relating to sexual harassment take some positive steps towards redressing the injustices perpetrated by men against women.

## VI. THE WAY FORWARD

China has made a good start by creating legislation on sexual harassment. However, the Chinese model suffers from several weaknesses relative to its counterparts in common law jurisdictions. A much more severe law is needed to deal with the problem of sexual harassment. Accordingly, the following suggestions and comments are offered.

First, the law of sexual harassment should not just protect women against sexual harassment by men, but also by women. Legislation on sexual harassment in other jurisdictions does not apply only to sexual harassment of women by men, but also to sexual harassment of women by women.<sup>91</sup> In some instances, women are also harassed by women.<sup>92</sup>

Second, there are some inherent problems in proving a case of sexual harassment. Sexual harassment deals with delicate human relationships. Some sexual acts may be perfectly justified in one situation, but unwelcome in another situation, such as viewing a wo-

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<sup>90</sup> Ding Guo Yuan, *Legal Experts Suggest to Include Sexual Harassment Prevention in Employment Contracts*, RENGONG DAILY NEWS, July 10, 2002, available at <http://news.sina.com.cn/c/2002-07-10/1148631213.html>.

<sup>91</sup> See, e.g., Sex Discrimination Ordinance, (1995) Cap. 480 § 6 (H.K.), available at <http://www.eoc.org.hk/EOC/GraphicsFolder/showsdo.aspx?id=556>; *Chen v. Taramus Rus*, [2001] 3 H.K.L.R.D. 541 (C.A.) (a judicial decision where a man sued for sexual harassment).

<sup>92</sup> *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998).

man's body, seeing her in a state of undress, or caressing or touching her.<sup>93</sup> Therefore at times it may be quite difficult to prove that the acts of sexual harassment were unwelcome.<sup>94</sup> When a prior relationship exists between a woman and a man or there is semblance of consent to the defendant's sexual overtures, the odds are against the claimant.<sup>95</sup> Reluctant consent or tolerating a sexual act due to economic pressures may also exculpate the defendant.<sup>96</sup> Furthermore, vacillation or delay in reporting sexual harassment does not help the plaintiff, and could lead the courts to believe that the sexual act was consented to.<sup>97</sup> Of course, where sexual harassment occurs within the four walls of an office, the word of the claimant against that of the defendant may create a doubt as to what really happened.<sup>98</sup> A seemingly neutral statement, such as "sex is beautiful" or the claimant is sexy, may not give rise to a claim of sexual harassment. Even asking a woman what sexual services a prostitute could offer may not be considered sufficient to constitute a claim of sexual harassment.<sup>99</sup>

Given the difficulty of the claimant's burden of proof in a sexual harassment case, a different approach needs to be adopted. Once the claimant has a prima facie case of sexual harassment, the burden should then be on the defendant to show that he did not contribute to the plaintiff's sexual harassment in any material way. This approach is frequently applied in negligence cases under the doctrine of *res ipsa loquitur*.<sup>100</sup>

Third, since sexual harassment is very common in workplaces and educational institutions, there needs to be a special provision to protect employees, students, and teachers. For example, in Australia and Hong Kong legislation has been enacted with special provisions to cover these situations.<sup>101</sup> Under those provisions, when an educa-

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<sup>93</sup> D.K. Srivastava & Charu Sharma, *Corporate Liability for Sexual Harassment in the Workplace*, 11 AUSTL. J. CORP. L. 170, 179-80 (2000).

<sup>94</sup> See, e.g., *Wong Kwok Mui v. Lee Yuen Tim*, 9 D.C.E.O. 1999, available at [http://legalref.judiciary.gov.hk/lrs/common/ju/ju\\_body.jsp?DIS=21750&AH=&QS=&FN=&currpage=](http://legalref.judiciary.gov.hk/lrs/common/ju/ju_body.jsp?DIS=21750&AH=&QS=&FN=&currpage=).

<sup>95</sup> See, e.g., *Chen v. Taramus Rus*, [2001] 3 H.K.L.R.D. 541 (C.A.).

<sup>96</sup> *Latter v. Braddell*, [1881] 44 L.T. 369 (Eng.), available at <http://books.google.com/books?id=lyMyAAAAIAAJ&printsec=frontcover&dq=editions:OCLC4506559&lr=>.

<sup>97</sup> D.K. Srivastava, *Proving the Wrong of Sexual Harassment*, 5 J. CHINESE & COMP. L. 205, 216-17 (2002); see also *Ten Big Sexual Harassment Cases in China*, *supra* note 33.

<sup>98</sup> *Ten Big Sexual Harassment Cases in China*, *supra* note 33.

<sup>99</sup> *Ratcliffe v. Sec'y for Civil Serv.*, [1999] 4 H.K.C. 237 (C.A.).

<sup>100</sup> See D.K. Srivastava, Charu Sharma & Nancy Leung, *Negligence*, in *TORT LAW AND PRACTICE IN HONG KONG* 180 (Kemal Bokhary, Neville Sarony, & D.K. Srivastava eds., 2005).

<sup>101</sup> For example, in Hong Kong, the Sex Discrimination Ordinance and Disability Discrimination Ordinance together with the relevant Codes of Practice on Employment came into full operation on December 20, 1996. It is unlawful under the SDO to discriminate against

tional institution or employer fails to protect against sexual harassment, they are liable to the complainant. A similar provision should be enacted in China. China is one of the most flourishing market economies of the world with many leading international companies doing business within its borders. Companies free from hostile work environments will have a more productive workforce.<sup>102</sup>

Fourth, the remedies for sexual harassment should not be the same as the remedies for any other civil wrong. In the case of harassment of an employee at a workplace, the damages awarded must not only be compensatory, but also punitive and exemplary. Low levels of damages are unlikely to encourage victims of sexual harassment to report the matter or bring a lawsuit against the wrongdoers.<sup>103</sup> On the other hand, if the levels of settlements and awards are high, this would send the powerful and enduring message that sexual harassment does not pay, and could also affect a company's credibility and financial stability.

However, awarding high damages may not always be the right remedy for a victim. As we have seen, sexual harassment cases in China can cause family problems. A husband or boyfriend may suspect his wife or girlfriend of some wrongdoing of her own. Therefore, provisions should also be included in the legislation to cover counseling the complainant's husband or boyfriend so that sexual harassment case does not break up marriages or ruin domestic lives.<sup>104</sup>

Fifth, it is important that both men and women are made aware that sexual harassment is a serious wrong and that the perpetrators of this wrong could be subjected to a legal action by the victim.<sup>105</sup> Some men engage in sexual harassment because they have psychological or other problems.<sup>106</sup> Much can be achieved by disseminating

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or harass a person on the ground of sex, marital status, or pregnancy in activities including: employment; education; provision of goods, facilities or services; disposal or management of premises; eligibility to vote for and to be elected or appointed to advisory bodies; and participation in clubs and activities of government. See Fact Sheet, Information Servs. Dep't, H.K. Special Admin. Regional Gov't, Equal Opportunities Commission (Nov. 2007), available at <http://www.gov.hk/en/about/abouthk/factsheets/docs/eoc.pdf>.

<sup>102</sup> Srivastava & Sharma, *supra* note 93, at 119.

<sup>103</sup> In the United States, the average amount of compensation for sexual harassment is about \$300,000 U.S. (\$2.34 million H.K.). See D.K. Srivastava & Scarlet Tsao, *Remedies for Sexual Harassment*, 10 ASIA PACIFIC L. REV. 141, 152-53 (2002).

<sup>104</sup> Ten Big Sexual Harassment Cases in China, *supra* note 33.

<sup>105</sup> *Employers in Mainland China May be Liable for Failure to "Prevent and Prohibit" Sexual Harassment*, CHINA MATTERS (Paul, Hastings, Janofsky & Walker, LLP, Worldwide) June 2007, available at [http://www.paulhastings.com/assets/publications/737.pdf?wt.mc\\_ID=737.pdf](http://www.paulhastings.com/assets/publications/737.pdf?wt.mc_ID=737.pdf).

<sup>106</sup> See DALIN LIU, MAN LUN NG, LI PING ZHOU, & ERWIN J. HAEBERLE, *SEXUAL BEHAVIOR IN MODERN CHINA* (Man Lun Ng & Erwin J. Haeberle trans., 1997).

information and educating the public. There is also a need for women to be more alert and aware of sexual harassment.

Sixth, in most cases of sexual harassment, decisions are made by male judges and because of this reason the law is usually construed through a masculine perspective. Therefore, in sexual harassment cases, a bench consisting of both male and female judges should make decisions. Interestingly, one prominent case in Hong Kong where the female claimant succeeded was decided by a female judge.<sup>107</sup>

Seventh, the employers in China should be asked to issue a code of practice for employees, which should include statements that sexual harassment is a serious wrong; that at the time of promotion or re-employment, conduct, including whether they have been involved in any sexual harassment, will be taken into account; and that those found guilty of sexual harassment will face disciplinary inquiry and their employment could be terminated. In addition, companies, especially large companies, should appoint a sexual harassment complaints officer.

Eighth, the Women's Federation of China, which was established to offer equality and protection to women and to give legal advice, should be more proactive. It should educate women on sexual harassment, advise them how to protect themselves, and advise them when to seek legal aid. It would also be a positive development if the Women's Federation of China were empowered to deal with actual cases of sexual harassment and provide adequate remedies to the victims, as is done by the Equal Opportunity Commission in Australia.<sup>108</sup>

Ninth, clauses against sexual harassment should be included in labor and other contracts.<sup>109</sup> An example of such a clause would be to provide that when a male senior employee calls for a female employee to speak with her alone in the office, he must leave the office door open.<sup>110</sup>

Sexual harassment will continue to be a problem as long as there is no serious effort to minimize it. Not only should the law be strengthened, but more importantly, a rigorous attempt must be made to change the social attitude. Education should emphasize the

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<sup>107</sup> *Yuen Sha Sha v. Tse Chi Pan*, [1999] 1 H.K.C. 731 (D.C.), available at [http://legalref.judiciary.gov.hk/lrs/common/ju/ju\\_body.jsp?DIS=19849&AH=&QS=&FN=&currpage=](http://legalref.judiciary.gov.hk/lrs/common/ju/ju_body.jsp?DIS=19849&AH=&QS=&FN=&currpage=).

<sup>108</sup> For example, the Equal Opportunity Commission in Western Australia has two major roles. The first role is to encourage recognition and an understanding of the principles of equal opportunity. The second role is to provide a means of redress to individuals who allege unlawful discrimination. See Yvonne Henderson, *About Us*, Equal Opportunity Commission, <http://www.equalopportunity.wa.gov.au/abouteoc.html> (last visited June 30, 2009).

<sup>109</sup> SHANGHAI STAR, *supra* note 55.

<sup>110</sup> *Id.*

equality of women and the role they play in society, and lessons need to be learned from other jurisdictions to make Chinese sexual harassment legislation more effective.