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Mind Matters: Protecting The Mental Health and Workplace Wellbeing of Employees

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Abstract

The COVID-19 pandemic has profoundly altered social and working environments in many ways. It has been established that social distancing policies, mandatory lockdowns, isolation periods, the fear of becoming ill, and the loss of income have significantly impacted people's mental health. Changes in working conditions have certainly been a determining factor in helping staff cope with mental health challenges. The law should guide modifications in the workplace, and the contention is that the law protects individuals from injustice and harm. This paper examines how the law considers mental health and dictates acceptable changes in the workplace. Based on doctrinal research, we critically evaluate existing laws and policies in Malaysia which focus on workers' rights related to mental health in the workplace. For purposes of comparison and locating Malaysian law on mental health in a regional context, we also examined legislation in neighbouring Indonesia. The review suggests strong similarities in the narratives of legislation in both countries, especially concerning laws governing employment law. The analysis also revealed that employers still had room for effective intervention, allowing the law to create more favourable mental health conditions if the right regulatory mechanisms were implemented.

Keywords: Mental Health, Workplace Conditions, Legal Mechanisms, Intervention, Malaysia

Introduction

The COVID-19 pandemic has highlighted mental health concerns in communities across the globe (WHO,2020). Numerous reports reveal that many people are struggling with mental health, and some have resorted to drastic measures out of desperation (WHO, 2020). Therefore, it is no surprise that concerns about health and safety at the workplace have increased as the COVID-19 pandemic forced movement control, confining people to limited space. The lockdown resulted in isolation, and individuals were forced to be alone in their thoughts as they mulled over financial problems, questionable work performance, and the fear of losing their jobs. Indeed, the unusual conditions caused by the pandemic have

challenged the very existence of humans as social creatures, exacerbating their daily struggles (Greg Miller, 2020).

Mustapa Mohamed, Minister for Economic Affairs in the Prime Minister's Department, revealed that Malaysia's poverty rate had risen to 8.4 per cent in 2020 from 5.6 per cent in 2019 (Bernama, 2021). According to the Economic Action Council Malaysia, 600,000 M40 households fell into the B40 or bottom 40% income group (Kana, 2021). The sudden and drastic decline in one's financial capabilities can be traumatic. This is partly reflected in data showing that 85.5 per cent of the 145,173 calls received by government-run helplines between March 25, 2020, and May 20, 2021, were from people seeking emotional support and counselling (Bernama, 2021).

Media reports appearing almost every day provide evidence of these difficult times. For example, a man was reported for locking up his wife and son because of stress from losing his job (Mohd Amin Jalil, 2021). Cases of abuse are also on the rise, as are suicide attempts (Hazlin Hassan, 2021). Hospital Universiti Sains Malaysia psychiatrist Dr Mohd Azhar Mohd Yasin opined that 2020 and 2021 would be the most emotionally and mentally taxing years for many people (Bernama, 2021).

According to studies in Malaysia, 20 % of the population reported experiencing stress before the pandemic (Bernama, 2021). However, this figure rose to 38% after the pandemic (Bernama, 2021), suggesting that mental health was deteriorating at an alarming rate. If not appropriately managed, stress can lead to depression and even suicide. According to the Ministry of Health Malaysia (MOH), 1,080 attempted suicide cases were reported to have received treatment at MOH hospitals between January and December 2020. However, this figure does not include statistics compiled by the Fire and Rescue Services Department Malaysia (JBPM) (Bernama, 2021). According to Datuk Nor Hisham Mohammad, director of the JBPM, there was a significant increase in attempted suicide cases in 2020 compared to data from just six years previously (Bernama, 2021).

According to calls from JBPM, there were 253 attempted suicide cases in 2020, compared to 183 in 2019, 170 in 2018, 151 in 2017, 146 in 2016, and 141 in 2015 (Bernama, 2021). Selangor had the highest number of suicide attempts between 2015 and 2020, with 265 cases, followed by Kuala Lumpur (169), Penang (163), Johor Bahru (136), and Labuan (136) (Bernama, 2021). The disturbing statistics on suicide, as reflected in this data and other sources, have resulted in more mainstream conversations about mental health in Malaysia, and awareness about the seriousness of the problem is more significant.

There is a definite impact of mental illness on performance in the workplace. In a 2016 study, the International Labor Organization (ILO) found that a severe workload, high job expectations, and workplace conflicts are strongly associated with mental health issues such as exhaustion, burnout, anxiety, and depression. Physically, they may be manifested in musculoskeletal problems and cardio-vascular illness, among other physical disabilities. For example, in Malaysia, evidence suggests an increase in employees suffering from anxiety, depression, and mental stress resulting from pressures felt at work (Zolkepli, 2021). Globally, one in every four people experience a mental health disorder at some point in their lives, and nearly two-thirds never seek treatment (MIND, 2020). As a result, any employer will almost certainly have employees suffering from depression, anxiety, bipolar disorder, PTSD, or other serious mental health issues. Though these issues cannot be classified as purely 'work-related,' they raise questions about the role of employers in ensuring the mental well-being of their employees and the duty of employers to care for their employees' mental health and well-being.

Employees are guided in determining their scope of responsibilities by policies and regulations to address occupational stress in the workplace and its associated costs. In addition, the right legislation should be in place to ensure that the well-being of employees is protected and that they have access to a safe and healthy workplace. In this paper, we examine the legislation on mental health in the workplace in Malaysia. Drawing on doctrinal research, we critically evaluate existing laws and policies that focus on workers' rights related to mental health in the workplace and offer recommendations on how the mental well-being of employees can be better regulated.

Methodology

In this work, qualitative and comparative research approaches are used. As part of these approaches, doctrinal legal research formed the basis of the investigation. Hutchinson and Duncan (2012) describe doctrinal analysis as lying at the foundation of the legal research method, and is unique to research in this discipline. Drawing on its principles, the investigation was guided by a detailed and critical analysis of the law as presented in sources such as cases, statutes, and regulations. This analysis aims to bring to the surface underlying themes and an emerging picture of the interconnected nature of the various sources of law. This is achieved through the gathering and organisation of documents to describe and discuss the law.

Given the goal of the present study was to examine the legal challenges related to addressing mental health issues in the workplace, the doctrinal approach was deemed suitable as it guides a systematic examination of legal information from multiple sources. The researchers first set the proposition that the law governing the well-being of employees should consider the importance of mental health. Next, legal documents related to employees' mental health were collected and analysed. The search for emerging themes meant that the researchers also needed to broaden their search by looking at laws related to the general conditions of employee welfare, even though they may not have been directly linked to mental health. As prescribed by researchers who carry out doctrinal studies, the selection of legal resources was carried out cautiously to ensure they were reliable. However, it should be noted that, as with all research methods, doctrinal research is not without criticism. The approach is limited in that the examination of legal documents can be somewhat mechanical without considering the society in which the law is practised. It is, therefore, important that the practical application of law are considered when executing doctrinal research.

Result and Discussion

A critical review of legislation related to mental healthcare in Malaysia

The framework of the right to health is strengthened by the global commitment made in the 2030 Agenda for Sustainable Development Goals (SDG), particularly SDG 3, which aims to ensure healthy lives and promote well-being for all people of all ages (The United Nations, 2021). While "mental health" does not have a legal definition, it refers to a spectrum that includes emotional well-being, mental health conditions, and mental illnesses (WHO, n.d). Mental health, like the physical health of individuals, can vary, and each person's experience with mental health is unique to them (Ganeshwaran Kana, 2021). This section of the paper examines the regulatory mechanisms for mental health in the workplace.

Mental Health Act 2001 (MHA 2001) and Mental Health Regulations 2010 (Mental Health Regulations)

Malaysia's primary mental health laws are the Mental Health Act 2001 (MHA 2001) and the Mental Health Regulations 2010 (Mental Health Regulations). The Mental Health Regulations also went into effect in 2010, much later than the MHA 2001. This law mainly concerns the lawful detention of a person who is not mentally capable of making a mature decision. The sole purpose of the MHA 2001 is to create a framework for the all-encompassing treatment of people with mental disorders. In addition, it calls for the construction of community mental health centres, private and public psychiatric hospitals, and nursing homes for the mentally ill (Kana et al., 2015).

According to section 2 of the MHA 2001, a mental disorder is any mental illness, mental retardation or incomplete mental development, psychiatric disorder, or any other disorder or disability acquired. Accordingly, the criteria listed in this definition does not apply to "promiscuity or other immoral conduct, sexual deviancy, alcohol or drug consumption, expressing, refusing to express, or not expressing a particular political or religious opinion/belief, or antisocial personality" (Khan et al., 2015). However, problems related to occupational stress are not covered by the definition of mental disorder under section 2 of the MHA 2001. As a result, it cannot adequately protect those who have survived suicide attempts or are dealing with mental illness.

Similar legislation is also found in neighbouring Indonesia, where a mental disorder is recognised as an occupational hazard. New ministerial regulations require employers to ensure their workers have an excellent work-life balance. The Indonesian Manpower Ministry, for example, included psychological well-being in a 2018 ministerial regulation on occupational safety and health standards. The regulation replaced an old law on occupational health standards issued in 1964, which stated that employers must implement stress management to ensure that workers do not have mental health problems (Ivany Atina Arbi 2018). Nevertheless, according to Law No. 18 of 2014 (the Indonesian Mental Health Act), the Mental Health Law had shortcomings in terms of problematic provisions. For example, it allowed medical personnel to force treatment on those they deemed "may endanger" themselves or others. These provisions had the potential to result in abusive treatment. Consent is a fundamental concept in medical ethics and international human rights legislation, and forcing someone to take medication or undergo treatment without their knowledge or consent violates their rights unless the patient's life is in imminent danger.

Furthermore, under the CRPD (Convention on the Rights of Persons with Disabilities), which Indonesia ratified in 2011, individuals with mental health difficulties, including those with psychosocial disabilities, have the right to make life-altering decisions. These judgements include employment rights. This right to legal ability cannot be denied based on a medical condition. Instead, the Indonesian government is obligated to provide support services that enable individuals to make these decisions or express their will and preferences and then respect those decisions.

Therefore, it can be surmised that workers in Malaysia and Indonesia are being deprived of their fundamental inclusive right to health in light of the current legal provisions in these countries and the reluctance of the governments to recognise and resolve mental health issues at the workplace. Lack of attention to mental health problems puts employees at risk.

Persons with Disabilities Act 2008 (PWD Act 2008)

Individuals without the mental capacity to make informed choices may have legal recourse under the Persons with Disabilities Act 2008 (PWD Act 2008). This Act defines "persons with disabilities" as those with long-term physical, mental, intellectual, or sensory impairments that may hinder their full and effective social participation. This Act defines "reasonable accommodation" as necessary and appropriate modifications and adjustments, not imposing a disproportionate or undue burden, to ensure persons with disabilities the enjoyment or exercise of quality of life and well-being on an equal basis with persons without disabilities; "rehabilitation" refers to a process aimed at enabling persons with disabilities to attain and maintain their complete physical and mental health.

Article 27 of the UN Convention on the Rights of Persons with Disabilities (CRPD) provides a globally enforceable legal foundation for advancing disability rights (including psychosocial disabilities). It recognises that disabled people have the right to work, should be treated equally, shouldn't face discrimination, and should be supported at work (WHO, 2022). The WHO's Global Plan of Action on Worker's Health (2008-2017) and Mental Health Action Plan (2013-2030) promote mental health in the workplace. This Act addresses social determinants of mental health, like living standards and working conditions, promoting health and mental health, reducing stigma and discrimination, and increasing access to evidence-based care through health service development and occupational health services.

Nevertheless, this Act is silent on mental health discrimination. In contrast to the United States, the United Kingdom, and Australia, Malaysia lacks anti-discrimination legislation protecting individuals' rights with mental health conditions. Although discrimination based on religion, race, descent, place of birth, or gender is expressly prohibited by the Federal Constitution, no reference is made to discrimination against disabled people. Hence, this Act appears to be advisory rather than enforcing. Moreover, recognising disabled people's rights in Malaysia seems motivated by charity rather than an inherent right. As a result of this lack of protection, questions arise about whether employees should disclose information about their mental health history to employers.

Occupational Safety and Health Act 1994 (OSHA 1994)

The most pertinent to mental health Malaysian law at work is OSHA 1994. The Act emphasises on the safety and health standards through self-regulation. Employers must abide by OSHA rules, codes of conduct, guidelines, and best practices. An employer could face a fine of up to RM50,000.00 and up to 2 years in prison if found guilty under OSHA 1994. OSHA 1994, however, only applies to particular industries. Employees must abide by OSHA 1994 and collaborate with employers to ensure a safe and healthy workplace. As a result, those who create and deal with risks are accountable for their effects on health and safety (Abdul Hamid et al., 2019).

Employers are required to provide a secure workplace for workers, but mental health is not mentioned explicitly in OSHA 1994. The standards define health as "a state of complete physical, mental, and social well-being and not merely the absence of disease" when explaining the objects of OSHA 1994, namely "safety, health, and welfare." The policies also define a "working environment" as encompassing a workplace's structural and psychological components. Therefore, under OSHA 1994, an employer's duty of care may include a worker's mental health, but only to the extent that it is "practicable." According to OSHA's definition from 1994, "practicable" is defined as taking into account the following factors: (i) the severity of the hazard or risk in question; (ii) the current state of knowledge regarding the hazard or

risk and any way to remove or mitigate the risk; (iii) ways to remove or mitigate the risk, if they are readily available and appropriate; and (iv) cost of removing or mitigating the risk.

Section 15 emphasises the employer's responsibility to ensure his employees' safety, health, and welfare at work, but this obligation only applies while the employees are on the job. This case establishes that for OSHA 1994 liability to arise, the risky activity must be part of the employer's undertaking. In *Jabatan Kesihatan Dan Keselamatan Pekerjaan v Sri Kamusan Sdn Bhd* [2013] MLJU 1549 ("Sri Kamusan"), the Court determined whether the accused had exercised due diligence or taken reasonable precautions to avoid the breach based on the case's circumstances. Section 55 of the Occupational Safety and Health Act of 1974 states, "It shall be a defence in any proceeding against a person for an offence under this Act or any regulation made thereunder to satisfy the Court that the offence was committed without his consent or connivance and that he had exercised all due diligence to prevent the commission of the offence, given the nature of the offence."

Occupational stress is not addressed by OSHA 1994, even though it effectively ensures worker safety and health. Employers are obligated to ensure the health and safety of their staff members under OSHA 1994. Typically, it was claimed that this liability was restricted to the business's premises. Instead of heavily emphasising mental health, the question of whether the workplace harms physical health is more prominent. This is why OSHA required employers to ensure that the workplace is free of any hazards that could endanger their employees' health. Additionally, OSHA 1994 does not contain explicit provisions requiring employers to address employee concerns about their jobs or personal lives that may lead to depression or anxiety that could result in mental health issues, a side effect of occupational stress. Hence, a supportive environment should be included in any OSHA 1994.

The law in Malaysia is not as explicit as the United Kingdom's Health and Safety at Work Act 1974 (HASAWA 1974), which is the primary law in the UK for workplace health and safety management. Section 2 of HASAWA 1974 mandates broad employer obligation to their employees. It states, among other things, that every employer is obligated to ensure the health, safety, and welfare of all their employees at work "to the greatest extent reasonably practicable" (Legislation.gov.uk. 2015). To keep a safe workplace, the employer should maintain a system of work, making appropriate arrangements in "handling, storage, and transport of articles and substances safely, provide information, instruction, training, and supervision as is necessary to ensure the health and safety at work of the employees".

In addition to the aforementioned legal obligations of employers, Section 10 of HASAWA 1974 also stipulates the creation of the Health and Safety Commission and the Health and Safety Executive (HSE), whose primary responsibility is to make any arrangements it deems necessary to safeguard employees' health, safety, and welfare while they are at work. On top of that, the Workplace (Health, Safety, and Welfare) Regulations 1992 addresses the working conditions of employees in the workplace. It places obligations on employers to ensure that the workplace is acceptable and safe for employees to perform their duties and poses no risk to employees or others. These regulations govern all areas of the work environment, including workplace maintenance and equipment.

In contrast to Malaysia, the United Kingdom has several Worker's Mental Health policies, such as the *Five Year Forward View for Mental Health* and the *Stevenson Thriving Farmer's at Work Review*. A task force has developed several suggestions for enhancing mental health outcomes by 2020/21 (Azmi et al., 2021). In 2017, the government commissioned independent reviews titled *Thriving at Work: The Stevenson Farmer Review of Mental Health* and *Employers on Mental Health and Employment*. They seek to transform

mental health services in schools, workplaces, and communities. Employers are encouraged to adopt "mental health core standards" to support better their employees' mental health (Parkin, E, 2020). It should be noted that Malaysian OSHA 1994 has its roots in HASAWA 1974.

OSHA 1994 is the most pertinent law in Malaysia related to mental health in the workplace. However, HASAWA 1974 in the United Kingdom gives HSE the authority to encourage the complete integration of mental health policies into all employer health and safety programmes. Programmes such as *Stress Priority* try to provide clear and agreed-upon guidelines for effectively managing various stresses. This would enable employers to understand what is expected of them and measure their performance regarding employee health and well-being in managing work-related stress. Under OSHA 1994, there is nothing like the HSE or programmes that enable employers to identify workplace stress causes and develop methods to mitigate its effects on employees. Although Malaysia and the United Kingdom have similar laws governing safety and health, Malaysia lacks a comprehensive legislative framework and effective policies. Furthermore, Malaysia is still far behind the United Kingdom and has much to learn from the United Kingdom's experiences in addressing mental health concerns.

Employment Act 1955 (EA 1955)

One of the most important employment laws in West Malaysia is the Employment Act of 1955 (EA 1955). Even though the Act silents about work-related stress, sections 12 and 13 mention workers' mental health by saying that if an employment contract is ended with or without notice, the employer must pay the worker an indemnity equal to the number of wages the worker would have earned during the time of the notice or during the time of the notice that has not passed.

These rules are in line with section 27 of OSHA 1994, which forbids discrimination in the workplace. Section 27(1) of OSHA 1994 says that an employer cannot fire, hurt, or change a worker's job on the reason he complains about something he thinks is unsafe or poses a health risk. Therefore, it is not too much to say that mental health problems cannot be used as a reason to fire someone. Section 10 of the EA 1955 says that the employer has to explain how the service can be ended. Thus, the contract needs to state that the employer has the right to terminate the employee's services if it turns out that the employee has a mental or physical illness that could affect how well the employee does their job.

The employee is entitled to a certain amount of pay if the contract is ended without notice because of physical or mental illness (EA 1955 Section 12 and 13). But if an employee does not meet the terms of their contract, their boss can fire them without warning (EA 1955, Section 14). Also, if the employee cannot meet the contract requirements, the employer can dismiss them without notice because the employee has already breached the terms of the employment contract. Still, the EA 1955 does not mention on job security. The Act states that employees have to be told about the terms of their termination. Even though this means it is harder for employers to terminate workers, a lot depends on what was in the signed contract.

In Indonesia, a labour law named Law No. 13/2003 [UU Ketenagakerjaan] Article 67 stipulates that an entrepreneur (also interpreted as the employer) who employs workers with disabilities is obliged to protect them by considering the type and degree of disability. Article 86 of Law Number 13/2003 states that employers are obliged to register their workers in the JKK (Jaminan Kecelakaan Kerja/Work Accident Insurance) programme as regulated in Presidential Regulation Number 7/2019. This protects them against occupational diseases, including mental and behavioural disorders arising from work activities (ICLG, 2022).

Furthermore, under Law Number 36/2009 [UU Kesehatan], the company should check the physical health, mental condition, and physical abilities of new workers or those who will be transferred to a new workplace following the nature of the work given to workers, as well as regular health checks. At the same time, workers must comply with occupational safety and health requirements. This is in line with the provisions of Article 86 paragraph (1) letter a of Law Number 13/2003 [UU Ketenagakerjaan] in conjunction with Law Number 11/2020 [UU Cipta Kerja] which reads " Every worker/labor has the right to obtain protection for occupational safety and health) is an affirmation that workers have the right to obtain protection for occupational safety and health".

Moreover, employees are protected against discrimination under Law No. 21 of 1999 on Ratification of ILO Convention No. 111 of 1958 on Discrimination in Respect of Employment and Occupation. This discrimination includes exclusion or preferences which have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the concerned after consultation with representatives of employers and workers' organisations where such exist and other appropriate bodies. The same protection against discrimination is also stipulated under the Manpower Law (ICLG.Com, 2022).

Therefore, as compared with this Indonesian law, the vagueness in Malaysia's EA 1955 is even more evident and suggests the need for improvement so that it can facilitate precise direction, serve as a reminder to employers, and provide reassurance to employees. This is even more necessary in pandemic conditions when firms are closing, and there is an increasing number of legal proceedings.

Conclusion

The gaps in legislation for addressing mental health issues in the workplace require self-regulation among Malaysian employees. Therefore, organisations should consider providing more special assistance via an employee support programme. For example, the Employee Assistance Program (EAP) introduced by an independent company -is an intervention program designed to assist companies in addressing employee behavioural problems and psychological well-being. The program serves as a proactive and preventive initiative by employers to help their employees manage the issues that potentially might severely impact their work performance. This support programme can be scaled up or down depending on the resources available to employers. More importantly, organisations must engage with each other and discuss supporting employees with mental health problems.

In addition, companies need to train supervisors on how best to create an environment where employees facing mental health issues feel safe enough to ask for support. There is a need for the establishment of an organisational culture which considers leadership and management behaviours, the publication of official policies or guiding documents, and standard practices and expectations. Together, these can reflect the organisation's shared values and create an environment that supports employees' mental health. To ensure such an environment, strategies must be implemented to change the "physical surroundings and social, economic, or organisational systems" to promote and enhance workplace mental health. For example, employers should exercise caution when dealing with employees frequently on sick leave. Rather than move immediately to begin disciplinary or absence management proceedings, employers should first determine if the reasons for the lack are stress-related. A trained manager can make a difference by reaching out and providing support and directing employees with issues to the right resources.

In light of the Covid-19 pandemic and changes in work culture, it remains to be seen whether the legislature will introduce reforms to the law related to mental health in the workplace. Nevertheless, employers should take "reasonable" and "practicable" steps to avoid potential liability, particularly under OSHA 1994. Measures such as implementing mental health education and awareness programmes, encouraging employees to discuss mental health issues with their employers, friends, and family, and supporting employees who seek professional help for mental health-related problems are proactive steps organisations need to take.

The challenges to work-life balance resulting from the pandemic serve as a reminder that mental well-being is just as important as physical well-being. It has also alerted organisations to take additional measures to ensure the health and safety of their employees to the extent practicable and maintain a physically and mentally good workforce.

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