

Suggestions for improvement in Vietnam employment laws in the context of gender equality

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Abstract

Improving gender equality in the workplace is an urgent task for Vietnam Communist Party and the Government. Despite the ratification of international conventions on labour, women rights, as well as amendment to relevant domestic laws, it appears that the provisions have not satisfied the requirements set forth to combat discrimination at work against women. Through this article, the author intends to propose some ideas to improve the laws on the protection of the current female workers' rights based on the 2012 Labour Code (amended and supplemented in 2019), related laws and sub-law documents.

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1 Introduction

In Vietnam, like in other developing countries, women continue to be the main force constituting to the poor, low-income labour group, which is more likely to be subject to unemployment, and have precarious employment conditions than men. Women also constitute the majority of unpaid family work, and of the 'invisible' part of the informal economy - they work as domestic workers, on street vendors or work in the entertainment industry. The position of women in the labour market is severely affected by socio-economic disadvantages resulting from gender-based discrimination. Vietnamese women often have less access to production resources, education, skills development and employment opportunities than men. The main cause of this situation is that the Vietnamese society assigns women a lower status and places the burden of unpaid housework on the shoulders of women. Current efforts are increasing the opportunities of women in business environments, preventing labour exploitation of children and women, and enhancing gender equality in labour legislation, such as prohibiting discrimination on all forms either directly or indirectly, promoting equal pay, preventing sexual harassment and balancing the retirement age for women and men.

Ensuring gender equality in Vietnam in the current period has made significant progress compared to before. From the

perspective of law, women and men are basically equal in economy, politics, culture and society. Although the implementation of equal rights between men and women still exists and many provisions of the law are equal, they, in fact, have not guaranteed the true equality. To overcome gender gaps is an important task in order to ensure the interests of each gender in the implementation of human rights in Vietnam as in President Hồ Chí Minh's advice considering the issue of men and women equality as, "A rather big and difficult revolution because of the disdain for male is a habit of leaving thousands of years. Because it is deeply ingrained in the minds of everyone, every family, every social class, we must revolutionise every person, every family, to all people. Although it is tremendous and hard but it will definitely be successful" [1].

The 2012 Vietnam Labour Code (amended and supplemented in 2019)ⁱ and other legal documents are still currently in the process of amending and gender equality is an important content to be adjusted to comply with the requirements and practices of society, enterprises and international integration. Gender equality at work can create many occupations, improve the quality of jobs, and expand employment opportunities for men and women.

ⁱ The Labour Code No. 45/2019/QH14 passed by the XIV National Assembly on 20th November 2019 with many new sections and articles, will take effect from January 1st 2021.



This is the ‘key’ to improve labour productivity for businesses, especially in the context that Vietnam is deeply involving in regional and international economies.

Based on the above context, the study will highlight some recommendations for Vietnamese employment law as well as contributing to ameliorating the laws that relate to sexual equality in order to ensure human rights and enhance the social value of the law.

2 Some particular suggested improvement in gender equality on employment laws of Vietnam

2.1 Protecting maternity, reproductive and child raising functions of female workers.

The 2012 Labour Code (as well as the 2019 version) still has some gender inadequacies. That is the situation of enterprises restraining the use of female workers due to fear of increasing costs due to the implementation of maternity leave, and organising kindergartens for their children. The restriction of female workers’ rights to work in some jobs has affected female employment opportunities, and hence, there are some ways to promote gender equality.

Firstly, female employees are entitled to social insurance allowance when they take leave from work for pregnancy check-up, miscarriage, abortion, dead foetus in womb, implementation of contraceptive methods, taking care of a sick child who is under 07 years of age or for nursing an adopted child under 06 months of age [2]. This is an interesting issue because the 2013 Constitution mentioned the equal rights between men and women in implementing reproductive and child raising functions, however, the new Code has not specified this issue to create consistency and uniformity in the legal system as well as in line with Vietnam’s international commitments. That is to say, it is necessary to amend the Code in the way that men also have the rights to take care of sick children and still receive benefits according to the Law on Social Insurance. At present, men are only allowed to take care of their wives who give birth to children[3]. It is necessary for female workers to take prenatal and postnatal leave so that mothers can restore their health and have a good source of milk for their children. But from the perspective of gender equality, the father also needs to share the nursing of young children, so Article 155 of the 2012 Labour Code (Article 137 of the 2019 Labour Code) needs to be revised and/ or supplemented in the direction of stipulating that the father - the male worker also has the right to take leave to care for his wife and children at a certain time; and at the same time allows the husband to take a break in lieu of his wife, after the wife has left a certain time to recover her health.

Secondly, employers are encouraged to participate in organising kindergartens and partly support the costs of

sending children to kindergartens of workers. The cost of the employer when implementing these measures and other measures to ensure and promote gender equality are entitled to the preferential policies of the State under the tax law. Employers are obliged to help and support the construction of kindergartens and the cost of sending children to kindergartens of workers. At the same time, adding clear regulations, when implementing measures to ensure and promote gender equality, employers are entitled to the State’s support policies. The costs of the enterprise supporting the construction of kindergartens or part of the costs of sending children to kindergartens for workers are counted as reasonable operating expense in production and business.

Thirdly, the State is responsible for creating plans and measures to establish kindergartens in places where there are many workers with comprehensive regulations and guidelines. This is a problem that has not been clearly reflected in the Labour Code, but has been stipulated in the Education Law 2006 (amended in 2009), the 2016 Law on Children and National Strategies, Plans and Economic Development Plans. Local authorities must include the goals of children into mandatory contexts of local strategies. The State should have more policies to encourage participation in the private sector, considering it is a conditional business under the 2019 Education Law, and the 2020 Investment Law. Especially, if employers themselves spend money building kindergartens for their workers, these expenses will be considered to be reasonable expense to be entitled to tax incentives from the Government.

Fourthly, the addition of “installing room for collecting and storing milk” to the new Labour Code aims to ensure higher enforcement and consistency with the provisions of the 2016 Law on Children, ‘Children have the right to be cared for and nurtured to develop comprehensively’ [4]; “The Government encourages agencies, organisations, families and individuals to support and take care of children and disadvantaged children. Organisations and individuals that provide care services to children shall receive support policies on land, taxes and credits” [5]. Moreover, that “Employers install a room for collection and storage of breast-milk that is suitable to the actual conditions in their workplace, the needs of female workers and the ability of employers, help female workers (who raise children over 12 months of age) to collect and store breast-milk at work” should be added into Decrees or Circulars guiding the 2019 Labour Code.

Finally, lawmakers also need to review the regulations that female employees who are pregnant have to dismiss their jobs because ‘labour contract expires’, making it more suitable to current practice. Because, once the labour

contract expires at the time that the female employee is pregnant, no enterprise will negotiate and enter into a new contract because the health and quickness of pregnant employees during this period decrease. Legislators should resurrect the Article 111(3) of the 1994 Labour Codeⁱ: during pregnancy, women are granted to postpone unilaterally termination of labour contract, even if the employer has reasons (specified in Article 38) to unilaterally terminate the labour contract. This regulation is very humane and suitable for the protection of women rights in accordance with the nature of the Labour Code.

2.2 Improving anti – sexual harassment regulations.

The concept of sexual harassment in the workplace needs to be improved as well. According to Research Report “Sexual Harassment at the workplace in Viet Nam: An Overview of the Legal Framework” [6], it is important for the Government to initiate a legal document guiding the implementation of the relevant articles of Labour Code that relate to sexual harassment at work.

Article 3(9) of the 2019 Labour Code is concerned with the definition of sexual harassment, which is “a sexual act of a person against another person in the workplace against the latter’s will. When encountering this behaviour, the victim has the right and obligation to actively collect, provide and hand over documents and evidence to competent state authorities and prove his/her request is valid and legal”. In practice, however, this behaviour is not easy to prove and even if there is evidence, it is difficult to apply the laws to handle. Therefore, it is proposed that the burden of proof should be transferred from employees to the employer, and the employee is only responsible for informing that there is a sexual harassment behaviour in the workplace as adversarial system countries.

When the Government issues new decrees defining and providing guidance on the implementation of a number of contents of the 2019 Labour Code, they should include regulations that focus on protecting victims of sexual harassment from retaliation, especially hiding their confidential information and sensitive images.

2.3 Minimum wage.

Firstly, the current Labour Code stipulates that the minimum wage must ensure minimum living needs of the

employees and their family. However, it is difficult to determine the minimum living needs. Therefore, this article should be, “Minimum wage is the lowest payment for an employee who performs the simplest work in normal working conditions”. Furthermore, it is necessary to study and assess the minimum wages applied in countries in the world with the same level of development as Vietnam, and on that basis, calculate the minimum wage for Vietnamese employees to ensure the equality between domestic employees and the employees around the world. The minimum wage should be determined and adjusted based on these factors: Minimum living standards of employees and their families, correlation between the minimum wage and common salary of employees on the market, consumer price index, economic growth rate, labour supply and demand relations, employment and unemployment, labour productivity and affordability of businessesⁱⁱ.

Secondly, the sanctions for handling violations of wages in general and the minimum wage in particular are not really effective, leading to the handling of violations facing many difficulties. The current level of sanctions (from 20,000,000 VND to 75,000,000 VND) in Article 16(3) of Decree No. 28/2020/ND-CP[7] does not really protect workers, therefore a change in sanctions is required to deal with the current issue. Increasing the sanction level higher than the current one will ensure that employers rule the law. A specific monitoring mechanism should be developed in enterprises, such as: The lowest salary within the enterprise, strengthening the functions of the monitoring organisations in the enterprise, and building a compensation mechanism for employees if violations happen.

Thirdly, it is necessary to clearly define the responsibilities of the authorities in the process of implementing regulations on minimum wage. Specifically, there should be regulations on the responsibilities, tasks and authority of the Government, management authorities and the National Wage Council in guiding the implementation of the minimum wage policy. There should be regulations on the responsibility of local authorities and relevant authorities in supervising the implementation of laws in the localities.

Lastly, the 27-NQ/TW Resolution [8] stated that, from 2021, the government will not directly intervene in the salary policy of enterprises. The role of the Trade Union will also change to receive adequate wages. The government will gradually reduce direct intervention in salaries for employees, which is a progressive trend in the market mechanism. Minimum wage is only the lowest rate,

ⁱAn employer is prohibited from this missing a female employee or unilaterally terminating the labour contract of a female employee for reason of marriage, pregnancy, taking maternity leave, or raising a child under twelve (12) months old, except where the enterprise ceases its operation. During pregnancy, maternity leave, or raising a child under twelve (12) months old, a female employee shall be entitled to postponement of unilateral termination of her labour contract or to extension of the period of consideration for labour discipline, except where the enterprise ceases its operation.

ⁱⁱIf a minimum wage exceeds the affordability of the business, it will not create productivity, competitiveness between markets, between businesses. Therefore, the adjustment of the minimum wage must also take into account the affordability of businesses.

so it needs to be negotiated to be in accordance with labour prices. The role of Trade Unions must be further enhanced, the biggest of which is wage negotiation through collective bargaining discussion agreements. Next, the employees themselves must be aware that they have the right to negotiate wages, which are written in the employment contract. For a long time, workers have not realised their value; when recruited, they do not dare to bargain about salary but agree with the level given by enterprises. In order for employees to reach a satisfactory salary, they also need the assistance of the Trade Union in providing information, rights and obligations.

2.4 Right to work.

Female workers should be entitled to make their own decisions about choosing jobs that adversely affect child-bearing and parenting functions provided that they are fully informed about these jobs. Ensuring this right will create many economic benefits for both workers and social insurance as it does not have a tremendous impact on the state and businesses. At the same time, it helps businesses pave the way for recruiting workers at work in accordance with the law and reduce violations. In sub-laws guiding the new Labour Code, gender equality should be amended in the way that regulations on employment will not prohibit female employees from performing their tasks that may be detrimental to child-bearing and parenting functions in order to ensure all the right to choose jobs. Currently, the Ministry of Labour, Invalids and Social Affairs is collecting comments on the Draft Circular to issue a list of

occupations and jobs that adversely affect child-bearing and parenting functions after the 2012 Labour Code was amended and The CEDAW (The Convention on the Elimination of All Forms of Discrimination against Women) Committee recommended Vietnam to review and reduce the list of occupations prohibited to women in Circular No. 26/2013/TT-BLDTBXH [9].

However, in term of heavy and toxic occupations that may adversely affect child-bearing and parenting functions, legislators may have to make separated regulations, creating the best conditions for women to have a choice.

3 Conclusion

Overall, promoting sustainable jobs and better income for women and men in a free, equal, safe and respectful dignity environment are two of the main priorities of the ILO Sustainable Employment and Economic Development (SEED) programme (its target is to lessen strifes by improving employment and economic prospects and focusing on the young and women in insecure areas). Integrating gender issues into promotion and job creation will help improve efficiency for productivity and economic growth, human resource development, sustainable development and reduce poverty. Advances in increasing female labour force and narrowing the income gap between men and women have been taking place worldwide over the past decades. However, we still need to make more efforts to bring gender equality in employment into reality.

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Một số kiến nghị hoàn chỉnh pháp luật lao động Việt Nam về bình đẳng giới

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Tóm tắt Cải thiện bình đẳng giới ở nơi làm việc là một nhiệm vụ cấp bách đối với Đảng và Chính phủ Việt Nam. Mặc dù Chính phủ đã phê chuẩn các công ước quốc tế về lao động, quyền của phụ nữ, cũng như sửa đổi luật pháp có liên quan, tuy nhiên, có vẻ như các điều khoản đã không thỏa mãn các yêu cầu đặt ra để chống phân biệt đối xử trong công việc đối với phụ nữ. Thông qua bài viết này, tác giả muốn đề xuất một số kiến nghị để cải thiện qui định pháp luật lao động về bảo vệ quyền của lao động nữ dựa trên Bộ luật Lao động 2012 (được sửa đổi và bổ sung bởi Bộ luật Lao động 2019), các luật liên quan và các văn bản dưới luật.

Từ khóa bình đẳng giới, pháp luật lao động, lao động nữ, Bộ luật Lao động, Việt Nam

MỤC LỤC

A. KĨ THUẬT - CÔNG NGHỆ

- | | | | |
|---|---|--|----|
| 1 | Nghiên cứu tổng hợp vật liệu LDHs Ca-Al và tối ưu hóa khả năng hấp phụ Congo Red bằng phương pháp bề mặt đáp ứng (RSM) | Nguyễn Thị Hồng Thắm, Nguyễn Duy Trinh | 1 |
| 2 | Tổng hợp sợi nano carbon phủ dây nano xúc tác PtSn nhằm tăng cường hiệu quả điện hóa của điện cực cathode trong pin Li-O ₂ | Phan Ngọc Hân, Bùi Trung Hiếu | 6 |
| 3 | Cloning of an AA13 Polysaccharide Monooxygenase Gene from <i>Neurospora crassa</i> into the plasmid pEX2B | Ho Ta Giap, Ngo Nguyen Vu, Vu Van Van | 13 |
| 4 | Xác định một số đặc điểm di truyền học của Tomato Spotted Wilt Vi-rút gây bệnh trên hoa cúc tại tỉnh Lâm Đồng | Nguyễn Thanh Việt, Trần Kiên Cường, Thân Văn Thái | 19 |
| 5 | Đánh giá đa dạng di truyền của một số loài Lan <i>Dendrobium</i> ở khu vực phía Nam Việt Nam | Lê Thị Ngọc Diệp, Nguyễn Thanh Điềm, Nguyễn Như Hoa, Trần Hoàng Dũng, Vũ Thị Huyền Trang | 24 |
| 6 | Thanh trùng Măng tây đóng hộp sử dụng thiết bị vi sóng | Mai Thanh Nhân | 33 |
| 7 | Phân lập vi nấm kháng vi sinh vật từ đất công viên ở thành phố Hồ Chí Minh | Mai Hà Thanh Bình, Lê Quang Hạnh Thu | 41 |
| 8 | Phân lập, định danh và khảo sát hoạt tính kháng khuẩn của cao chiết sinh khối nấm thuộc chi <i>Pycnoporus</i> | Trương Nguyễn Thuận Thiên, Ngô Nguyên Vũ | 46 |

B. KHOA HỌC SỨC KHỎE

- | | | | |
|----|--|--|----|
| 9 | Khảo sát sơ bộ qui trình phân lập thành phần hóa học của lá cây Dó Bầu (<i>Aquilaria crassna</i> Pierre) | Ngô Thị Châu | 52 |
| 10 | Khảo sát thành phần hóa thực vật và độc tính cấp của cao chiết lá Sa Kê (<i>Artocarpus altilis</i> Moraceae) | Nguyễn Thị Kỳ Duyên, Nguyễn Trần Hưng Yên, Nguyễn Thị Thùy Trang | 56 |
| 11 | Nghiên cứu và đánh giá độc tính cấp, tác động kháng viêm của bài thuốc gia truyền Cao Khai sản xuất tại tỉnh Ninh Thuận | Nguyễn Thị Bạch Tuyết, Hoàng Thị Phương Liên, Lê Mộc Nhiên, Mai Thị Ngọc Ánh, Phạm Trí Nhựt, Bạch Long Giang | 61 |
| 12 | Ứng dụng chất chuẩn imperatorin phân lập từ dược liệu Bạch chỉ thuộc Công ty Dược Hà Giang để khảo sát hàm lượng imperatorin trong sản phẩm Đông dược có chứa dược liệu Bạch chỉ trên thị trường | Lê Hải Đường | 68 |
| 13 | Khảo sát hoạt tính gây độc tế bào ung thư của các cao chiết cây Trâm Bầu <i>Combretum quadrangulare</i> Kurz | Nguyễn Thị Phương, Nguyễn Hữu Hùng, Bùi Lê Minh | 74 |
| 14 | Tổng hợp para-menthan-3,8-diol từ citronellal theo cơ chế Prins | Phan Tấn Phát, Phan Thị Thanh Thủy | 80 |
| 15 | Đánh giá sự hiểu biết về nhà thuốc đạt chuẩn GPP của sinh viên khóa 15DDS, Đại học Nguyễn Tất Thành | Nguyễn Thị Xuân Liễu, Trương Xuân Dung | 84 |

C. KHOA HỌC XÃ HỘI VÀ NHÂN VĂN

- | | | | |
|----|--|----------------------|----|
| 16 | Suggestions for improvement in Vietnam employment laws in the context of gender equality | Quang Ha Tran Nguyen | 90 |
|----|--|----------------------|----|