

Labouring under false assumptions?

**Exploring the rifts between international standards
and cultural values in Vietnam's Labour Code reform**

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Preface

As the ‘Future of Work’ is being discussed around the world, women continue to be the most under-utilised and potentially game changing factor for fair and prosperous economic growth. Recent research shows that a reduction in the gap in participation rates between men and women by 25 per cent has the potential to increase the GDP in Asia Pacific by as much as US\$ 3.2 trillion. A recent report by the International Labor Organization and Gallup confirmed that the majority of women and men worldwide would prefer that women work in paid jobs and find it perfectly acceptable for women to have paid work outside of the home. Why then does female labour force participation still lag behind that of males in all countries of the region? To examine the opportunities and challenges of the future at work for women, the International Labour Organization (ILO) and the Australian Government’s Department of Jobs and Small Business have partnered in a project called “Women and the Future of Work in Asia and the Pacific”. The following paper was part of a competitive ‘call for proposals’ under this project. It will be one contribution into the ILO’s forthcoming ‘Women and the Future of Work in Asia and the Pacific regional report’. These selected papers are meant to provide evidence based policy recommendations to inform decision makers on where best to invest efforts and resources to achieve the best returns for the future of work. We warmly thank the researchers for their contributions to this project. We would also like to extend our deep gratitude to the Technical Advisory Group (TAG) members for their contributions to the project Edgard Rodriguez, Ratna Sudarshan, Shauna Olney, Helen Lockey, Sara Elder, Rebecca Duncan, Kristin Letts, Rhea Kuruvilla. We thank them all for their guidance for the call for proposals as well as their technical inputs to the selected papers. ILO technical Coordination and inputs have been led by Joni Simpson and Aya Matsuura. Thanks to Noorie Safa for pulling the reports together and to Shristee Lamsal for her overall coordination of the Women and the Future of Work in Asia and the Pacific Regional Conference

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Abstract

Vietnam's achievements in workplace gender equality are laudable: ILO's fundamental gender equality labour Conventions and CEDAW are ratified; the proportion of women and men participating in the workforce is high; and Vietnam's *National Gender Equality Strategy* (2011-2020) and supporting *Action Plan* specify a range of targets on women and work. However, rifts emerge, since a number of key strategy targets remain unrealised, and some indicators are regressing. For instance, the gender wage gap is widening, and the level of women's work informality is an issue. While gender inequalities at work reflect a combination of factors, gender norms are formative, particularly the perception that only women have responsibility for care and domestic work, even when also engaged in paid work outside the home. Rifts are bound to occur when policy on a liberalised economy, making the most of opportunities for competitiveness, does not fit with traditional roles. Vietnam is currently undertaking a comprehensive reform of the 2012 Labour Code, adopted with donor support through the ILO. After five years' implementation, ILO has funded internal analyses of compliance with the core international labour standards underpinning ILO's 1998 Declaration on Fundamental Principles and Rights at Work (which include gender equality) and it is again supporting review of the Code's industrial relations provisions. In 2017-18, the Australian Government, through the Investing in Women program and with UN Women, has provided technical assistance on gender dimensions of the Labour Code to the Ministry of Labour, Invalids and Social Affairs (MOLISA). The removal of gender barriers to women's economic participation will not only align the Code with Vietnam's own equality legislation and international labour obligations, but will also provide an enabling environment for a modern, gender equitable world of work. Three areas discussed in this case study are: equalisation of the retirement age between men and women; removal of stereotyped references to women as physically weaker and as having primary responsibility for family and home; and questioning the basis for paid menstrual leave. The paper explores the differences of opinion among stakeholders, on women's work in Vietnam.

Keywords

Gender equality, labour, Vietnam

1. Background

This ‘practitioner’ paper arises from the Australian Government’s engagement in Labour Code reform in Vietnam.

Vietnam has well established commitments to gender equality at work. The *National Gender Equality Strategy (2011-2020)* (Prime Minister Decision 2351/QD-TTg) seeks to narrow the gender gap in labour force participation, and promote employment for rural and ethnic minority women in particular. It endorses using mass media to ‘diversify images of women with different roles and occupations’ and specifies a range of targets, including women’s entitlement to a 40 per cent share of newly created jobs. However, many of these targets remain unrealised as 2020 approaches. For instance, despite the high labour force participation rates for men and women, at 83.5 per cent and 73.2 per cent respectively, this gap has been static for the past 5 years (ILO, 2018; UN Women, 2016). The average monthly salary of paid workers is 5,715,000đ (Vietnamese Dong) for men as compared with 5,225,000đ for women. This gap equates to 5,888,000đ each year, equivalent to women effectively ‘working for free’ for one month each year, as compared with male peers.

In the informal sector, women’s wages are estimated to be as low as 50 per cent of men’s (World Bank, 2011). Furthermore, a time use survey pilot of 330 men and 495 women across nine provinces in Vietnam found that women spend an average of 314 minutes per day on unpaid care work, as compared with 190 minutes spent by men (ActionAID, 2017). Women’s access to technical and vocational training has declined over the period 2004-2012, while that of men’s has increased (UN Women, 2016). Finally, as recently as September 2017, the National Assembly Standing Committee called for an investigation into reports by the Vietnam General Confederation of Labour of a spate of firings from industrial zones, 80 per cent of whom were women workers under 35 years of age (VNA, 2017). This suggests a friction between women’s ability to work and their traditional status as carers, as well as the precariousness of their work status overall.

In 2017, the Government of Vietnam embarked upon reforming its *Labour Code (2012)*. The Labour Code is among the first to be subject to the *Law on the Promulgation of Legislative Documents* (the so-called ‘Law on Laws’) (Law No. 80/2015/QH13 and its implementing Decree No. 34/2016/ND-CP of 14 May 2016) which now requires all legislation to be subject to a policy impact assessment process, including a gender impact assessment.

The removal of gender barriers to women’s participation in the economy is a target of the Australian Government’s *Gender Equality Strategy for Vietnam* (DFAT, 2016). After discussions together, the Australian Government therefore undertook to support the Ministry of Labour, Invalids and Social Affairs (MOLISA) in gender transformative Labour Code reform. This was undertaken through Australia’s Investing in Women program and UN Women.

The first step was to commission a gender analysis of the second draft of the Labour Code, to inform the gender impact assessment, and be available to the Drafting Committee and, eventually, relevant National Assembly committees as the new draft

Code is finalised and adopted. The gender analysis (Hodges, 2017) proposed a number of revisions in line with Vietnam's own domestic and international legal obligations, free trade agreements under negotiation at the time, and to support the adoption of a modern, gender transformative Labour Code. It relied in particular on the latest CEDAW committee recommendations and observations issued by ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) in relation to ratified Conventions 100 and 111.

Labour law typically negotiates the overlap in productive and reproductive life stages, and it safeguards sex-specific biological functions including pregnancy, child-birth and breastfeeding (ILO, 2009: paras 103-104). However, closer inspection of the second draft of the Labour Code revealed a repeated projection of gendered labour norms, not dictated by biology. These ranged from:

- Entitlements for women such as a much earlier mandatory retirement age, on account of their greater vulnerability;
- Women being denied access to 77 heavy and hazardous occupations, 38 of which are prohibited on the basis of sex and an additional 39 types of jobs are prohibited for pregnant women and women with children under 12 months;
- Protections against work that is harmful to women's reproductive and parenting function, when occupational health and safety measures could equally benefit men in those jobs; and
- Leave entitlements tied to women's primacy as carer, and not made available to men.

The gender analysis offered justification, comparative labour law examples and technical wording to remove or amend 50 provisions of the Labour Code. It also drew on several ILO analyses specifically recommending harmonisation of the retirement age in Vietnam, a topic which has been discussed over successive revisions of the Labour Code.

This 'practitioner' paper focuses on just three proposals from the analysis:

1. Equalisation of the mandatory retirement age between men and women, from the current 60 and 55 years respectively;
2. Removal of stereotyped references to women as physically weaker than men, and as having primary responsibility for family and home care; and
3. Questioning the paid menstrual leave entitlement of a 30-minute break, per day during menstruation.

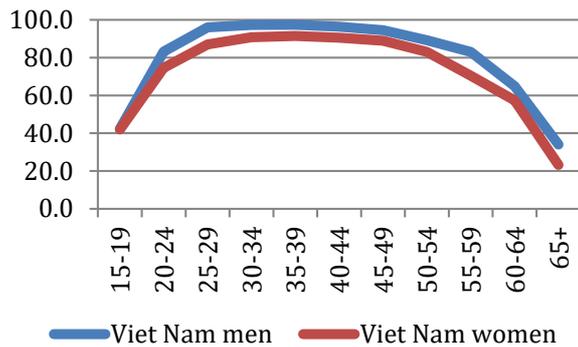
The fascination at the heart of this paper is that not only have these proposals generated debate, which the author team has observed, but that it is contested whether they are *affirmative* or *discriminatory* for women in Vietnam. The essence of the positions is presented below, alongside secondary data insights into context.

2. Key Findings

2.1 Equalisation of the retirement age between men and women

Figure 1 demonstrates the effect of the current legislative position on labour force participation.

Figure 1 Activity rates by sex and age group, 2012



Source: ILO *Economically Active Population, Estimates and Projections (6th edition, October 2011)*

The latest draft of the Labour Code proposes two options for retirement age provisions: maintain the current retirement age of 55 for women, and 60 years for men; or, from 2021, progressively raise the age, in six-month increments annually, until reaching 60 years for women and 62 years for men. With the rise in average life expectancy in Vietnam from 67.6 years in 1980 to 75.9 years in 2013 (UNDP, 2016), the proposed increase in official retirement ages is well justified. Survey data also shows that more than half of urban men and women workers continue to work beyond retirement age (World Bank, 2017a).

However, the equalisation of men and women’s retirement ages, which was introduced in the 1960s (World Bank, 2009), is not at the heart of the debate. Vietnam, Mongolia, Lao PDR and China are now among the last Asian countries to have a gender-based retirement gap. The explanations commonly offered for preserving this gap include: on account of women’s ‘weaker health’, stemming from the double burden of child bearing and work years; to release women to take care of the grandchildren and allow their daughters/-in-law to work; and to make room for young people in general to work (World Bank, 2009). It was also stated, by women and men alike, that early retirement is a reward for and favours women.¹

Let’s unpack those assumptions. The weak health argument is somewhat answered by the fact that women outlive men by seven years, and thus have an estimated 16 *healthy* years from the age of 60 (WHO cited in World Bank, 2017a), and the fact that women continue working anyway. Objections to raising or equalising the retirement age often relate to youth employment. In Vietnam, an estimated 191,000 bachelor degree holders are currently unemployed (Asia News Monitor, 2016a). It is an emotive issue. However, reports have highlighted that young job market entrants are not recruited to the posts held by retiring workers, who themselves are not in entry-level positions. A recent study in China also found no relationship between youth employment and the employment rates of older workers (Munnell and Wu, 2013 cited in World Bank, 2017a).

The gender equality argument for equalisation of the retirement age considers structural factors. The first is non-discrimination, specifically equal rights of all workers, irrespective of sex or gender. Secondly, women exit the workforce five years earlier

¹ This draws on both reported and anecdotal evidence, the latter noted during informal meetings where the authors have broached the topic over the period 30 June 2017 to date.

than men, as well as having career breaks for maternity, and increasingly for ageing parents. This leads to a lower level of pension contributions overall. It can also undermine women's career prospects and access to skills development. For example, in the public sector in Vietnam, the age ceiling on training is 45 years for women and 50 years for men. This makes it difficult for women to be competitive for senior posts, against men. It also lowers the mean wage for women.

Retirement is integrally linked with social protection. With the above-mentioned career breaks, women have fewer years to accumulate savings, to supplement the contributory pension value. Women's longer life expectancy mean that in Vietnam, for every man over 80 years, there are currently 2.39 women (HelpAge, 2017). Structural factors therefore expose women to a higher risk of poverty in later life. This risk is being acknowledged by other countries such as Australia, where it is estimated that one in three older women live in poverty (Feldman & Radermacher, 2016).

A last rationale for a convergence in retirement ages is fiscal. The Vietnam Social Insurance Fund has stated that if the retirement age is not changed, fund contributions will equal pay-outs by 2020. The reserve fund would be depleted by 2037 (Asia News Monitor, 2016); an ILO study suggests even sooner, by 2027 (ILO, 2012). So a Vietnamese woman who is 45 years old today, and a Vietnamese man who is 50 could potentially retire without being able to draw a pension despite having contributed during their working years. The liquidity of the Fund is a grave problem for Vietnam, but the five year gap nonetheless removes *by law* the option for women to accumulate more savings and options for resilience. The UN Committee on the Elimination of Discrimination against Women recommends that Vietnam adopts equalisation (CEDAW Committee, 2015). Vietnam progress is scheduled to be reviewed by the Committee in 2019 to see how Vietnam is responding to the recommendations.

2.2 Removal of stereotyped references to women as physically weaker and as having primary responsibility for family and home care

Conformity with gender roles is esteemed, and legitimated, in Vietnam as is often the case elsewhere. In a study of 8,424 men and women across nine provinces of Vietnam (ISDS, 2015), there was high agreement with the statement that 'an ideal wife is one who takes good care of her husband and children', and 'an ideal husband ensures a good economic life for the family' (ISDS, 2015: 116-117). The pervasiveness among both sexes in Vietnam of the norm for women to take care of the home was also confirmed by the ILO-Gallup World Poll (2017), which surveyed 142 countries. On the question of whether women should work at paid jobs, care for their families and homes, or do both, women and men in Vietnam returned similar results. Thirty per cent of men and women respondents agreed that women should work for their families and home. Strikingly, 44 per of men said that women should do both, as compared with 34 per cent of women.

Despite Vietnam's ratification in 1997 of ILO's Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and of the Equal Remuneration Convention, 1951 (No. 100), an ILO review of management jobs advertised found that 83 per cent specified a preference for men (ILO, 2015). In the face of women's economic and military roles during the 20th century, one commentator suggested that the restructuring

of the economy (i.e. *Đổi Mới*) in 1986 led to a ‘*re-domestication*’ of women (Truong, 1997 cited in Nyugen, 1999).

Traditional gender values also permeate the Labour Code. It includes a chapter entitled *Separate Provisions Concerning Female Employees Equality in the Workplace*. While accommodation of women’s reproductive role needs to be stipulated, the text goes further to reinforce normative ideals. In *Article 114 of the 2nd draft Code (which repeats Art. 153, of the 2012 text) State policies on female employees*, Subsection 3 promotes employment and working conditions to enable women to ‘harmoniously combine their working lives with their family lives’, and Subsection 5 provides for ‘female employees to acquire additional occupational skills that are suitable to their physical and physiological characteristics and their motherhood functions’ (Hodges, 2017). Women’s motherly bodies are further protected in *Article 121 of the 2nd draft (Art.160 of the original text) Employment of female employees in special cases*. It includes the proviso that women’s reproductive and parenting functions must not be affected by work, and refers to an official list of jobs proscribed for women on that basis. The list serves as a true gender division of labour, contrary to international labour law that stipulates that working conditions should not impair the health and safety of all workers, male or female. The text is silent on equivalent protections for men.

The list of prohibited jobs issued by MOLISA includes occupations that are heavy and hazardous such as in construction, that are remote but potentially lucrative such as in mining, and work submerged in water such as in fisheries. Such occupations - without appropriate protection - pose a high risk to occupational health and safety, for men and women. Data from the Vietnam Labour Force Survey shows that 17.5 per cent of the total female workforce worked in the Industry, Mining and Construction sector and that 48.1 per cent participated in Agriculture, Forestry and Fishery (GSO, 2014 cited in UN Women, 2016: 40). Even accounting for the sector clustering, experts and local observation suggest that women are present in all of these sectors. However, it may be that they are relegated to non-standard jobs and work on informal terms, owing to the prohibition on hiring women.

This policy example highlights the ‘competing social interests’ (Nakayama, 2007) between women’s work and women’s motherhood function. The legislative provisions may be well meaning in their original protective scope, but they perpetuate out-dated notions of women’s capacity to work and to choose. By not participating in key industries of the future, women may also lose out on skill-biased technological change. In the Concluding Observations on Vietnam’s seventh and eighth reports, the UN Committee on the Elimination of Discrimination against Women requested that the list of proscribed occupations be reviewed and reduced (CEDAW Committee, 2015). ILO’s most recent CEACR Observation under Convention 111 (ILO, 2018) likewise queries how Art. 160 works in practice, given that measures restricting women’s employment beyond maternity protection are often based on stereotypical perceptions of women’s suitability, capabilities and appropriate role in society. The CEACR points out to the Government of Vietnam that provisions relating to the protection of persons working in harmful or dangerous jobs should protect the health and safety of both women and men at work.

2.3 Questioning menstrual break entitlements

The third policy exposition in this paper concerns paid menstrual leave. Under *Article 116 of the 2nd draft Code Maternity protection for female employees*, women are entitled to a 30-minute paid break each day during menstruation.

This provision posed a challenge for the author team itself. Should this leave entitlement be lauded as gender-progressive, since it acknowledges the discomfort and for some, pain of menstruation? Should it be regarded dispassionately as equivalent to other biological functions that are accommodated by the Labour Code, such as pregnancy and breastfeeding? Or does it originate from the conceptualisation of women as physically enfeebled and dirty due to loss of blood, on account of their reproductive anatomy? Furthermore, does it attempt to overcome the embarrassment and stigmatisation of menstrual bleeding, or is the policy borne of wanting women to remove themselves from the workplace at this time?

A doctoral thesis traces the origins of this workplace entitlement to Bolshevik Russia. After human losses from conflict, the Bolshevik leadership was concerned with the replacement of the population and the generation of a workforce for industrialising. This led to pro-natalist policies, including menstrual leave, to protect women from amenorrhea and irregularities related to work exertion (Nakayama, 2007). In the Asia region, six countries are identified as having enacted menstruation-related provisions, including paid and unpaid leave (variously, in Indonesia, Philippines, China, Japan, Vietnam); and additional pay, if leave is not taken (in South Korea) (Hodges, 2017a). The effect of menstruation and of a lack of adequate water, sanitation and hygiene facilities on workforce participation has been raised in UN Special Rapporteur and Expert Group Reports (for example, A/HRC/18/33/Add.1, 29 June 2011 and A/HRC/32/44 cited in Hodges, 2017a). The recent UN Women report notes that States' lack of attention to facilities in this area keeps girls out of school, and women out of work (UN Women, 2017). Presently, the characteristic of menstruating is not a recognised ground for non-discrimination.

In Vietnam, the author team was informed that this entitlement is more often monetised in practice. There is no research available in Vietnam to clarify the uptake of menstrual breaks or 'compensation' to allow the purchase of materials that make it easier for women to attend to period flow or pain. However, press reports on utilisation of the entitlement in Japan suggest that stigma is still a determining factor. Women are concerned with 'antagonising' male colleagues, electing to take sick leave rather than disclosing their menstruation (McCurry, 2016). Strikingly, there is little research on the issue of menstruation for women in work - UN, feminist or otherwise. Nonetheless, it is anticipated that this provision will remain in Vietnam's Labour Code.

3. Conclusion

There are compelling reasons why the above gender equitable reforms matter for the future of work for Vietnamese women. The legislative reforms offer Vietnam a (likely) once-in-a-decade opportunity to remove gendered barriers that have no scientific foundation, thereby encouraging the employment of women, investment in their professional development and skills over a longer work span, expansion of their occupational choices and avoidance of wage inequalities. It also counters the precarity

that disproportionately affects women workers, who need to work part time or in piecework to fulfil care responsibilities, have higher job turnover as a result, and have to work beyond retirement age on an informal basis (GSO, 2016).

The gender equitable reforms also set vital foundations for Vietnam's development trajectory. With estimates that the pension fund reserves will be depleted by 2027 (ILO, 2015), support to increases in women's formal work lifespan, career prospects and productivity, with the accompanying increase in savings and social insurance contributions, would be prudent and just.

With women needing to fund the 22 years between retirement at 55 and average life expectancy of 77 years, the proposed amendments would also reduce the inevitability of retired women living in poverty. Vietnam is one of Asia's fastest ageing populations. It is projected that older people (60+ years) will account for 30 per cent of Vietnam's population by 2050. The old age dependency ratio to the working age population will be 27 by 2040 (HelpAge, 2017). Therefore any policy inducements and flexibility for both men and women to share caring responsibilities will be well warranted.

Finally, the fundamental significance of these changes is personal. These reforms seek to ensure that the future world of work in Vietnam, an integral, decades-long aspect of most men and women's existence, is decent, dignified, and supports human flourishing and choice.

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