

PERFECTING VIETNAM LABOUR-TRADE UNION LAW IN ACCORDANCE WITH NEW-GENERATION FREE TRADE AGREEMENTS¹

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Abstract: *The incorporation of labour provisions (understood as labour-trade union provisions in Vietnam) into free trade agreements (FTAs) in recent years has created new-generation FTAs. Since then, amendment and perfection of laws, including regulations on labour - trade unions, in accordance with the new-generation FTAs have been both an internal need and a response to meet requirements for Vietnam's international integration. The paper focuses on the following issues: (1) Provisions on labour-trade unions in new-generation FTAs; (2) Core standards of labour provisions in new-generation FTAs; (3) Directions to enhance the laws on labour - trade unions of Vietnam in the coming time in accordance with the provisions of new-generation FTAs.*

Keywords: *Perfecting laws, labour, trade unions, new-generation free trade agreements.*

1. Provisions on labour-trade unions in new-generation free trade agreements

Up to now, there have been over 70 free trade agreements which contain provisions on labour across 120 countries in the world. Among those, conditional provisions account for 40%, and promotional provisions for approximately 60%:

Conditional provisions: rely on conditions to bind countries to their

commitments, failure of signatory states to fulfill their duty may result in economic penalties, either fines or sanctions. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) has many features of this type.

Promotional provisions do not link labour provisions to economic penalties, instead, they establish a framework for dialogue, cooperation and supervision to enhance labour

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standards and working conditions in signatory countries. The EU-Vietnam Free Trade Agreement has many features of this type.

Basically, there are two main reasons to include labour provisions in new-generation FTAs:

Firstly, the integration of labour provisions in new-generation FTAs aims to ensure a fair competitive environment between parties in a trade relationship. In fact, countries with low labour standards where salaries and working conditions are not negotiation-based tend to benefit from lower production costs than those with higher standards to protect the rights of workers. Therefore, to avoid unhealthy competition resulting in the failure to ensure fundamental working conditions for workers, signatory countries of new-generation FTAs often make individual labour-related commitments.

Secondly, the integration of labour provisions into new-generation FTAs aims to ensure rights and minimum conditions of workers, thus better protecting human rights in a civilized society. In the context of globalization, ensuring workers' rights is gaining importance. Workers are those who directly produce goods and services in international trade so they must be beneficiaries and entitled to share the results of this process. Specifically, their rights, and fundamental working conditions must be ensured

In recent years, labour provisions in FTAs, including conditional and promotional provisions, have seen an increase in the extent of the need to improve labour and social situations in signatory countries of FTAs. This spirit can be found in new-generation free trade agreements that Vietnam has become a party to, for example, CPTPP and EVFTA.

2. Core standards of labour provisions in new-generation free trade agreements

New-generation FTAs Vietnam has signed recently, most notably CPTPP and EVFTA, have one thing in common: they both refer to the duty to implement the 1998 Declaration of the International Labour Organization (ILO). It is stated in Clause 2 Article 13.4 EVFTA that: "Each Party reaffirms its commitments, in accordance with its obligations under the ILO and *the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, adopted by the International Labour Conference at its 86th session in 1998; to respect, promote and effectively implement the principles concerning the fundamental rights at work". It can be seen that the fulfillment of obligations as a member of ILO is an indispensable component of new-generation FTAs. That is to say, Vietnam has the duty to "*promote, respect and implement*" fundamental labour rights and principles in the 1998

Declaration of ILO², including its 8 fundamental conventions, namely:

- Freedom of association and right to collective bargaining (Convention no.87 and 98);

- Abolition of all forms of forced or compulsory labour (Convention no.29 and 105);

- Effective abolition of child labour (Convention no.138 and 182);

- Abolition of discrimination in employment and occupation (Convention no.100 and 111).³

Up to now, Vietnam has approved 7 out of the 8 aforementioned conventions and plans to approve the remaining one - Convention No.87 - in 2023. In my opinion, Convention no.87, which can be summarized into "Freedom of association", is the core Convention in international labour standards. Without it, other standards cannot be practically and effectively implemented. For example, the right to collective bargaining and the right to strike cannot be implemented without ensuring minimum standards of freedom of association. These rights are of utmost importance to protect workers' rights in a market economy and in the context of international integration.

The spirit of freedom of association can be understood as follows⁴:

Firstly, it is the freedom to establish and join an organization of workers and employers. It is stated in Article 2 Convention no.87 that:

"Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization". Some "keywords" that can be noted here are:

- "Without distinction" means: This right is exercised by workers and employers alike. It is also applied to public servants, with the exception of military and public security officers. These subjects must be regulated in detail in the law. This provision allows for the exclusion of managing officers, on the condition that they have the right to establish their own organization. However, the subjects within this category must not be too broadly defined so as to avoid ridding others of their right to join an organization.

- "Subject only to the rules of the organization concerned" means that the organization decides for themselves which workers or employers to co-opt.

- "Freedom" means that every legal regulation that restricts the freedom to choose an organization is against the Convention.

- "Without previous authorization" means that the law governing the registration of an organization cannot act as a license to establish or join it. The government does not have the right to refuse registration of an organization.

Secondly, it is the autonomy of workers and employers to make

decisions on internal affairs. This has been stated in Article 3 Convention no.87: "Workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof". This provision could be understood as follows:

- "The right to draw up their constitutions and rules" means that the law only lays down fundamental requirements to protect members. Overly detailed requirements are against this Convention

- "The right to elect their representatives in full freedom" means detailed legal provisions on representatives of an organization are against this Convention. The strict supervision of the government in the election process is also against the spirit of the Convention.

- "The right to organize administration" can be understood as the financial independence of an organization. The government does not have the right to enter an organization's headquarters, to examine its correspondence and communications without permission of the court.

- The right to strike - limitations

and prohibitions of this right can be justified: i) in the event of an acute national crisis and for a short period of time; ii) in the public service, only for public servants exercising authority in the name of the State; iii) in essential services - services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.

- The right to strike - in reality, is justified when: i) Prior notice is given; ii) There is a major vote to call a strike; iii) Strike decisions must be taken by secret ballot; iv) Mediation and voluntary arbitration are overdue (Compulsory arbitration is only acceptable in cases of acute national crisis, public service and essential services).

Thirdly, it is the protection of an organization from being dissolved or suspended as stated in Article 4 Convention No.87: "Workers' and employers' organizations shall not be liable to be dissolved or suspended by administrative authority". Dissolution or suspension of an organization is a serious violation of the freedom of association.

Fourthly, it is the freedom to establish and join federations, confederations and the right to affiliate with international organizations: "Workers' and employers' organizations shall have the right to establish and join federations and confederations and any

such organization, federation or confederation shall have the right to affiliate with international organizations of workers and employers" - Article 5 Convention no.87. The right to affiliate with international organizations includes the right to receive their support, including financial support.

3. Directions to perfect the labour-trade union law of Vietnam in the coming time in accordance with the provisions of new-generation free trade agreements

Over the past period, in just 7 years, Vietnam has issued two Labour Codes (in 2012 and 2019) and is preparing to approve the amended and supplemented Trade Union Law (currently the 2012 Law on Trade Union). This clearly reflects the internal need to perfect labour-trade union law to meet the requirements of socio-economic development of the country. The 2019 Labour Code (which took effect from 01.01.2021) contains new regulations reflecting the objective reality, however, it is necessary to continue studying and perfecting legal provisions, especially, decrees of the State relating to the implementation of fundamental ILO Conventions, in particular Convention No. 87 on *"Freedom of Association and Protection of the Right to Organize"*.

In the process of amending and perfecting labour-trade union law related to the aforementioned issues, it is necessary

to identify fundamental directions⁵:

Firstly, to fully grasp the following principle "Renew the leadership methods of the Party for socio-political organizations, especially trade unions in the process of international integration. Renew the organization and activities of Vietnam General Confederation of Labour to meet the requirements of the new situation; provide sufficient resources to ensure the effectiveness of representation, protect the legal and legitimate rights of workers, and encourage workers and their organizations in enterprises to join Vietnam General Confederation of Labour";

Secondly, attach great importance to the motto "Ensure that the establishment and operation of workers' organizations in enterprises are compatible with the process of legal framework perfection; management tools and methods consolidation to facilitate smooth operation of these organizations in accordance with provisions of Vietnam law and principles of the International Labour Organization (ILO), simultaneously maintaining social and political stability".

Based on aforementioned ideas, I would make some proposals to amend and perfect a number of provisions related to the implementation of Convention No. 87 on the *"Freedom of association and protection of the right to organize"* as follows:

Firstly, it is necessary to issue and maintain the implementation of regulations related to the right of workers to associate and establish an organization at enterprise-level and beyond enterprise-level according to a roadmap.

A grassroots representative organization is an organization of workers established on a voluntary basis with a view to protecting legal and legitimate rights of workers in labour relations. Workers are entitled to the right to establish, join and participate in activities of their representative organizations as stated in the law. Grassroots workers' representative organizations include: Grassroots trade-unions (within the system of Vietnam Trade Unions) and workers' organizations. After being legally established, workers' organizations can join the system of Vietnam Trade Unions. Workers' representative organizations are equal in terms of rights and obligations in the protection of legal and legitimate rights of workers in industrial relations.

It is stated in Article 5 Convention No.87 that: "*Workers' organizations (...) shall have the right to establish and join federations and confederations and any such organization, federation or confederation shall have the right to affiliate with international organizations of workers (...)*". Thus, according to the roadmap, it will be possible to form

immediate upper-level workers' organizations (not included in the current system of Trade Unions) in accordance with provisions of Vietnam law, at regional, industrial zone, local and interprovincial level... However, it is necessary to ensure that the core principle and objective of workers' organizations must comply with the principle of its establishment, which is *to represent and protect legal rights of workers*. Workers' organizations are not allowed to conduct any activities that might compromise national security, social order and safety, nor are they allowed to participate in any activities unrelated to their objective.

Secondly, it is necessary to have practical regulations to ensure the prevention and abolition of interference and discrimination against the organization and operation of workers' representative organizations; as well as their equality and autonomy when established.

In order to effectively represent and protect the rights of workers as mentioned, there must be legal provisions to protect workers' organizations from the interference and discrimination of employers with a view to disabling or impairing their ability to represent and protect the rights of workers; to ensure employers' obligation to negotiate in good faith when conducting collective bargaining with workers' organizations, especially on

salaries and other working conditions for workers.

To combat interference and discrimination, it is imperative legal provisions ensure that these organizations have the following rights once registration procedures are completed.

- The autonomy to elect an executive board.

- The autonomy to approve their own constitutions and rules

- The autonomy to charge membership fees and manage their own finances and property.

- The right to represent in collective bargaining and dialogue in accordance with the law.

- The right to strike in accordance with the law.

Thirdly, there are some proposed amendments to the 2012 Trade Union Law and the Government Decree guiding the implementation of the 2019 Labour Code on workers' representative organizations.

- *Fundamental provisions that need amending and supplementing are as follows:*

- + Provisions on ensuring the autonomy of workers' organization in enterprises to approve their own constitutions and to manage their finances and membership fees. Related articles include: Article 6, 26 and 27 of Trade Union Law.

- + Provisions on ensuring the

equality between trade unions and workers' organizations in terms of the right to consultation, including Article 10, 11, 12 and 13 of Trade Union Law.

- + Provisions on ensuring the equality and autonomy in property management between trade unions and workers' organizations, including Article 28 of Trade Union Law.

- + Provisions on ensuring that officers in the Executive Board of trade unions and workers' organizations must be elected by members of their organizations.

- *After Vietnam approves Convention no.87 of ILO, it is necessary to build a Law or Decree to provide for the following contents:*

- + Methods to ensure the autonomy of workers' organizations in electing the executive board; approving constitutions and rules;

- + Methods to manage the finances of these organizations (which sources of finances are allowed and how to manage spending and usage), to raise and draw on the 2% fund;

- + The relations between workers' organizations in and outside of enterprises: the procedure to request support; manners of receiving technical support; types of technical support allowed. These provisions are with a view to preventing interference that goes against the activity's objective.

- + Activities that workers' organizations are prohibited from

conducting or participating in, simultaneously ensuring the right to organise and the objective to establish progressive, harmonious and stable labour relations, ensuring security and development.

+ The participation of workers' representative organizations in dialogue, negotiation and strike mechanisms in an enterprise.

+ Provisions on handling trade union disputes; and protecting leaders of workers' organizations from unfair treatment by employers. ■

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Notes:

(1) This is part of a ministerial study's findings: "Ensuring human rights in new-generation free trade agreements - Current theoretical and legal issues of Vietnam" led by Assoc.Prof.Dr. Le Van Trung and chaired by Ho Chi Minh National Academy of Politics under Contract no.686-HĐ/HVCTQG dated 28/12/2018.