

The Right to Strike in Vietnam's Private Sector

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Abstract

This article addresses the right to strike in the context of the new Labour Code and amended Trade Union Law of Vietnam.¹ It analyses major problems posed today by wildcat strikes in Vietnam's private sector. It argues that the ongoing approaches of the Vietnamese government and its social partners in strike resolution are ineffective and inconsistent with International Labour Standards. Finally, it suggests a model for the prevention and settlement of such strikes.

Keywords: wildcat strike, private sector, new Labour Code and amended Trade Union law, Vietnam

1. INTRODUCTION

After the end of the American/Vietnam war in 1975, Vietnam was ruled by the unified law of the Communist Nord Vietnam, which denied all legal rules in the field of industrial relations enacted by the former authoritative bodies in South Vietnam. It followed centrally planned economic policies for the entire country until the “*đổi mới*” (innovation) period initiated by the Communist Party of Vietnam (CPV) in 1986.

As a result of “*đổi mới*,” two monopolized forms of ownership, namely state and collective ownership, operating in the forms of state-owned enterprises and co-operatives, ceased to exclusively constitute the Vietnamese economy. The Constitution recognizes a socialist market economy with multiple forms of ownership and economic sectors, of which the state sector holds the most important role.²

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1. The new Labour Code of Vietnam was approved on June 18, 2012, and took effect on May 1, 2013, replacing the Labour Code of June 23, 1994 (hereafter referred to as the 2012 Labour Code). The amended Trade Union Law of Vietnam was approved on June 20, 2012 and took effect on January 1, 2013 (hereafter referred to as the 2012 Trade Union Law).

2. Article 51 Clause 1 of the amended Constitution dated November 28, 2013 (hereinafter referred to as the 2013 Constitution).

A large number of state-owned enterprises have been privatized. By the beginning of July 2013, there were 457,343 enterprises operating in the country—an increase of 9.5% compared with the same period in 2012. The number of state-owned enterprises was reduced by 6,852, accounting for 1.5% of the total number of operating enterprises.³

Although enterprises of different sectors are recognized equally under the law,⁴ state-owned enterprises are granted more privileges. They utilize a large percentage of the country's financial capacities (70% of land, 70% of official development assistance (ODA), and 60% of commercial credits). However, they only account for 32.4% of the national gross domestic product (GDP),⁵ employing only 10.2% of salaried workers (52.2 million of the employed population).⁶ Meanwhile, 89.6%⁷ of the employed population works in the private sector.⁸

The right to strike in Vietnam's private sector was first recognized in the former Labour Code.⁹ Article 5 Section 1dd of the 2012 Labour Code affirmed this fundamental right to strike in the private sector. A strike is defined as “A temporary, voluntary and organized stoppage of work by workers' collective in order to gain their demands during the resolution of the labour disputes.”¹⁰

Article 210 of the 2012 Labour Code establishes a regulation where only trade unions are entitled to organize and lead strikes. Accordingly, strikes must be organized and led by the executive committee of the workplace trade union; in non-unionized undertakings, strikes shall be organized and led by an upper-level trade union at the workers' request.¹¹

According to Vietnam General Confederation of Labour (VGCL) statistics from 1995 to the end of 2012, there were 4,922 wildcat strikes,¹² of which only 100 wildcat strikes took place in state-owned enterprises, and approximately 1,300 wildcat strikes took place in domestic private enterprises.¹³ 78.5% of the wildcat strikes took place in foreign-invested enterprises, mainly in labour-intensive companies specializing in garment and textile (33.8%), footwear (9.2%), wood processing (10%), and electronics and mechanical engineering (14.8%); 80% of strikes occurred in industrial hubs in southern Vietnam, particularly Ho Chi Minh City, Binh Duong, and Dong Nai provinces.¹⁴ Surprisingly, 70.99% of the wildcat strikes occurred in unionized enterprises.¹⁵

3. Manh Bôn (2013).

4. The amended Constitution, Article 51 Clause 2, November 28, 2013.

5. Lê Huy (2014).

6. General Statistics Office (2014), p. 28.

7. *Ibid.*

8. There is no formal definition on the term “private sector.” In practice, the private sector refers to the sector comprising domestic private and foreign-invested enterprises.

9. Labour Code, Article 7 Clause 4, 1994 (hereafter referred to as the former 1994 Labour Code).

10. The 2012 Labour Code, Article 209.

11. Strikes were organized and led by the executive committee of the workplace trade unions or the executive committee of the temporary workplace trade unions. In non-unionized enterprises, strikes were organized and led by representatives nominated by the workers' collective as prescribed by Article 172a of the former 1994 Labour Code. This is no longer allowed by the 2012 Labour Code.

12. In this article, “wildcat strikes” refers to spontaneous strikes, illegal strikes implemented by workers at the workplace level, ones not organized and led by trade unions.

13. Quốc Anh (2013).

14. Lê Xuân Thành (2013), p. 1.

15. Vietnam General Confederation of Labour (2011), p. 36.

The 2012 Labour Code has been in effect for over a year. However, wildcat strikes are a constant, ongoing problem. For example, in 2013, there were 351 wildcat strikes¹⁶ and, in the first nine months of 2014, there were 154 strikes.¹⁷ This, unfortunately, proves the ineffectiveness of the strike settlement mechanism outlined in the 2012 Labour Code.

2. WHY ARE WILDCAT STRIKES INCREASING IN THE PRIVATE SECTOR?

There are different reasons for the increase in wildcat strikes. Between 2008 and 2010, for example, violations of workers' rights (rights-based conflicts) by employers were the main reason for wildcat strikes. Since 2011, interests-based conflicts are the cause of more strikes. Although wages and allowances are paid to workers in accordance with law, workers are unable to guarantee their minimum living needs due to high inflation.¹⁸

According to the Labour-Wage Department's Deputy Head of Ministry of Labour, Invalids, and Social Affairs (MOLISA), Lê Xuân Thành, one of the causes of increased wildcat strikes are regulations implemented in foreign-invested enterprises that are inconsistent with Vietnamese culture.¹⁹

According to my own observations, however, there are other reasons for the increase in wildcat strikes. In this article, I attempt to explain these from a legal and political perspective. The major causes of wildcat strikes are low wages resulting from weak collective bargaining mechanisms, restricted freedom of association for both employers and workers, and ineffective intervention in wildcat strike settlements by authoritative bodies.

2.1 *Weak Collective Bargaining Mechanisms*

Unlike in other countries, Vietnamese workers have generally resorted to wildcat strikes as their first resource to make demands on employers. Dialogue in the workplace is ineffectively implemented. According to a survey conducted by the FLA 3.0 Vietnam Project in 2013, 60% of the workers interviewed have never used a channel of dialogue in their enterprises and 30% said the mechanism to settle workers' grievances is ineffectively implemented.²⁰

Collective bargaining agreements are formalistic, so most workers do not have the opportunity to participate in the collective bargaining process. According to VGCL reports, the rate of enterprises achieving collective bargaining agreements is 65.22%: 64.57% in foreign-invested enterprises, 59.21% in domestic private enterprises, and 96.33% in state-owned enterprises. However, approximately 90% of workers do not participate in the collective bargaining process.²¹ Consequently, the collective bargaining agreements in numerous enterprises are formalistic and mainly are made by the employers.

16. Thúy Ngọc (2014).

17. Bắc Việt (2014).

18. Quốc Anh (2013); Hoàng Quân (2014).

19. Hoàng Quân (2014).

20. Thúy Ngọc (2014).

21. Thanh Thủy (2013).

According to the surveys, most of the successful collective bargaining agreements in foreign-invested enterprises and domestic private enterprises contain provisions which replicate the laws.²² For example, the Ho Chi Minh City Department of labour, invalids, and social affairs has received 8,395 collective bargaining agreements for registration since 2002. However, in practice, enterprises developing collective bargaining agreements mainly attempt to show that there are collective bargaining agreements in their enterprises, instead of demonstrating the successful results of the collective bargaining process on the part of the representatives of the workers' collective and the employers. Consequently, 123 (70%) of 175 enterprises where strikes took place in Ho Chi Minh City secured collective bargaining agreements by the end of August 2011.²³ The weakness in collective bargaining mechanisms has led to the problem that the actual wages of the workers are heavily dependent on the minimum wage as regulated by the government.

2.1.2 *Minimum Wage Determination in the Private Sector versus State-Owned Enterprises*

Wages are paid to workers in accordance with employment contracts, provided they are not lower than the regional minimum wage rate promulgated by the government.²⁴ The minimum wages are paid to workers who perform the simplest work in normal working conditions. These must cover the minimum living needs of workers and their families.²⁵

Before October 5, 2011, there were two separate minimum wage systems applied, to domestic private and state-owned enterprises on the one hand and foreign-invested enterprises on the other.²⁶ In order to attract foreign investment, minimum wages in foreign-invested enterprises remained constant from 1999 to 2006. In addition to joining the World Trade Organization (WTO), increasing wildcat strikes have pressured the government to increase minimum wages for workers in foreign-invested enterprises and equalize minimum wages for both domestic private and foreign-invested enterprises. Since the Decree No. 70/2011/NĐ-CP promulgated by the government in August 22, 2011, the regional minimum wages have been equally applied to foreign-invested enterprises, the domestic private enterprises, and state-owned enterprises employing workers under employment contracts.²⁷

The regional minimum wages since January 1, 2015, have been VND 2.15 million/month in region IV (around EURO 80/USD 100); VND 2.4 million/month in region III (around EURO 89/USD 111); VND 2.75 million/month in region II (around EURO 102/USD 127);

22. Tổng Văn Công (2013).

23. Centre for Industrial Relations Development (2012), p. 6.

24. The regional minimum wage rate promulgated by the government refers to four economic regions. Region I comprises urban districts and certain rural districts of Hanoi City, Ho Chi Minh City, Bien Hoa City, Binh Duong province, and Vung Tau City of Ba Ria Vung Tau province; regions II, III, and IV are less economically developed areas. For more details on the list of the four regions, see Annex of Decree No. 103/2014/NĐ-CP dated November 11, 2014, on the regional minimum wages of workers in enterprises, co-operatives, co-operative groups, farms, households, individuals, and agencies, organizations employing workers under employment contracts, which took effect on January 1, 2015.

25. The 2012 Labour Code, Article 90 Clause 1, Article 91 Clause 1.

26. See e.g. Decree No. 77/2000/NĐ-CP dated December 15, 2000; Joint Circular No. 32/2000/TTLT-BLĐTĐBXH-BTC dated December 29, 2000; Decree No. 203/2004/NĐ-CP dated December 14, 2004; Decision No. 53/1999/QĐ-TTg dated March 26, 1999, etc.

27. Decree No. 70/2011/NĐ-CP took effect on October 5, 2011. It is no longer effective.

VND 3.1 million/month in region I (around EURO 116/USD 144).²⁸ However, according to the VGCL's findings on the minimum living needs of workers from 2012 to 2016, workers are only able to afford between 61% and 72% of minimum living needs on the regional minimum wage rate.²⁹ According to the MOLISA Minister Phạm Thị Hải Chuyền, the new regional minimum wage only meets approximately 60% of the minimum living needs of the workers.³⁰ This shows the inappropriateness of the current legal framework on minimum wages to address minimum living needs. As a result, the effectiveness of the government's constantly increasing minimum wages as a response to wildcat strikes remains doubtful.

2.1.3 Actual Wage Determination in the Private Sector versus State-Owned Enterprises

Before the 2012 Labour Code, actual wages were decided differently in the private sector and state-owned enterprises. The 1994 former Labour Code, Decree No. 114/2002/NĐ-CP dated December 31, 2002, guiding the implementation of Articles of the Labour Code on wages, were the two legal acts on wages in the private sector. Wages in state-owned enterprises were differently decided, as regulated by Decree No. 205/2004/NĐ-CP dated December 15, 2004.

The 2012 Labour Code equally regulates the mechanism used to determine wages in the private sector and state-owned enterprises. Decree No. 49/2013/NĐ-CP dated May 14, 2013, guides the implementation of Labour Code articles on wages and replaced the above-mentioned Decree Nos. 114/2002/NĐ-CP and 205/2004/NĐ-CP dated December 14, 2004. Accordingly, enterprises of different sectors are required to develop wage scales and tables that are used as the basis for negotiating wages in employment contracts and paying wages to different types of workers in different enterprises. The development of wage scales and tables must be based on principles promulgated by the government.³¹

In addition, enterprises are required to consult workplace trade unions in developing wage policy, namely wage scales and tables.³² In order to better protect workers in non-unionized enterprises, the 2012 Labour Code requires non-unionized enterprises to consult the immediate upper-level trade unions (*công đoàn cấp trên trực tiếp cơ sở*) in the development of wage policy.³³ However, according to my observations, the effectiveness of this provision is doubtful. On average, immediate upper-level trade unions comprise two or three full-time trade union officers. Trade unions in industrial zones generally comprise four full-time trade

28. Article 3 of Decree No. 103/2014/NĐ-CP.

29. Vietnam General Confederation of Labour (2013).

30. Nguyễn Mi-Trung Hiếu (2014).

31. Under Article 93 of the 2012 Labour Code and Article 7 Clauses 1–3 of Decree No. 49/2013/NĐ-CP, the number of wage grades in the scale depends on the complexity of management and work or title requirements, but the gap between two consecutive wage grades must be equal to at least 5%. The lowest wage level in the wage scale must be defined by the enterprises on the basis of the complexity of work or title corresponding to the qualifications, skills, duties, and experiences required to implement the work or title, but must not be lower than the regional minimum wage level prescribed by the government, where the lowest wage level of workers receiving vocational training must be at least 7% higher than the regional minimum wage levels prescribed by the government. The wage rate of workers undertaking heavy, hazardous work and extremely heavy, hazardous work must be at least 5% and 7% higher, respectively, than the wage rate of workers undertaking similar work in normal working conditions.

32. The former 1994 Labour Code, Article 57. This provision is affirmed in Article 93 Clause 2 of the 2012 Labour Code.

33. According to Article 93 Clause 2 of the 2012 Labour Code, employers are required to consult workplace-level trade unions in developing wage policy in the respective enterprises; Article 7 Clause 6 of Decree No. 49/2013/NĐ-CP dated May 14, 2013, guides the implementation of Articles of the Labour Code on wages and Article 10 Clause 3 and Article 17 of the 2012 Trade Union Law.

union officers.³⁴ According to VGCL statistics, by October 2014, total trade union membership was 8.3 million, accounting for approximately 53% of workers in the country, with 120,000 workplace-level trade unions, 63 Federations of Labour, and 23 Sectoral Trade Unions.³⁵

The limited personnel capacity of immediate upper-level trade unions and the large number of non-unionized workers lead to difficulties in non-unionized enterprises' contributing opinions to the development of wage mechanism as required by the 2012 Labour Code.

The legal provision requiring enterprises to develop wage scales and tables has not been strictly implemented. In practice, only 30% of enterprises, of which approximately 10% are domestic and private, develop and register wage scales and tables with the authoritative competent bodies.³⁶

The 2012 Labour Code no longer requires enterprises to register their wage scales and tables. Instead, the local labour authority³⁷ or MOLISA³⁸ in respect of one-member limited liability enterprises owned by the state should be notified of these.

In practice, enterprises develop a mechanism to determine workers' wages and adjustments based on the lowest and highest wage-rate system. The lowest wage rate in enterprises is, on the whole, equal to or higher than regional minimum wage rates as regulated by the government.³⁹

Wildcat strikes mainly take place in labour-intensive enterprises such as the garment and textile industries, shoes and leathers, fishery processing, etc., as mentioned above. These enterprises apply the wage system where a small wage difference exists between different types of workers. The wages of different types of workers are often adjusted equally to the increased regional minimum wages announced by the government.

In enterprises such as mechanics, manufacturing, business services, etc., a large wage difference exists between different types of workers. These enterprises mainly increase the wages for low-paid workers so that the adjusted wage rates of these workers are higher than the new regional minimum wages announced by the government. Meanwhile, the wages of the highly paid workers are mainly unchanged.⁴⁰

In other countries, such as Belgium, in addition to the wages, all types of allowances are subject to social insurance obligations. Meanwhile, only wages specified in employment contracts⁴¹ act as the basis for paying social insurance premiums according to Vietnamese law. This legal provision has created a gap through which enterprises abuse the law. Numerous domestic private and foreign-invested enterprises establish two different systems

34. VGCL-ILO Industrial Relations Project (2012), pp. 1, 3.

35. K.Y.M. (2014).

36. Ministry of Labour, Invalids and Social Affairs (2011), p. 19.

37. Article 93 of the 2012 Labour Code. This Article shows a positive change in terms of granting more autonomy to enterprises in wage determination, instead of being determined by complicated administrative requirements for wage scales and tables as prescribed by the former 1994 Labour Code.

38. Article 7 Clause 6 of Decree No. 49/2013/ND-CP and Article 2 Clause 3 of Circular No. 18/2013/TT-BLĐTBXH dated September 9, 2013, guiding the management of labour wages and the bonuses of workers in one-member limited liability enterprises owned by the state.

39. National Wage Council (2014), p. 2.

40. *Ibid.*, p. 3.

41. In the state sector, wages considered for paying social insurance premiums are wages corresponding to wage grades and seniority allowances; position allowance as prescribed in Article 94 Clause 1 of the Social Insurance Law dated June 29, 2006.

of wage scales and tables. One system shows the wages prescribed in the employment contracts, which are used as the basis for contributing social insurance premiums and deal with the social insurance bodies. The other system shows the workers' actual income, comprising wages and other types of allowance, in order to remain competitive.⁴² For example, foreign-invested enterprises pay workers at the lowest rate, while other types of enterprises pay workers just slightly higher than the minimum wage required by law and account for 72% of the workers' income. In order to reduce the amount of social insurance premiums, foreign-invested enterprises pay workers different types of allowances, such as meal, attendance, transportation, accommodation allowance, etc., which account for 28% of workers' income.⁴³

In general, workers in state-owned enterprises are paid the highest. For example, in 2013, the average wage was VND 5.58 million/month (around EURO 204/USD 259). The average wage in privatized, state-owned enterprises in 2013 was VND 5.94 million/month (around EURO 218/USD 276). The average wages in domestic private enterprises and foreign-invested enterprises are the lowest. They were VND 4.65 million/month (around EURO 170/USD 216) in domestic private enterprises and 4.77 million/month (around EURO 175/USD 221) in foreign-invested enterprises in 2013.⁴⁴

According to the VGCL survey conducted in 2014, the average monthly expenses of workers in region I were VND 4.78 million (around EURO 175/USD 222); VND 4.13 million (around EURO 151/USD 192) in region II; VND 3.85 million (around EURO 141/USD 179) in region III; VND 3.31 million (around EURO 121/USD 154) in region IV. Only 12.3% of the interviewed workers said they have savings.⁴⁵

The findings of the survey conducted by the Trade Union of the Dong Nai industrial and processing zones in 2014 showed that the average wages of workers in Bien Hoa City, Dong Nai province were between VND 3.67 (EURO 125/USD 172) and VND 6 million (EURO 208 /USD 287). Most workers either save only a small amount of money or are unable to afford the costs of living, especially in cases of sickness.⁴⁶

2.1.4 *The Role of the National Wage Council in Minimum Wage Determination*

The former 1994 Labour Code required that the government consulted the opinions of the VGCL, the Vietnam Chamber of Commerce and Industry (VCCI), the Vietnam Cooperative Alliance (VCA), and relevant bodies before deciding on the regional minimum wage. The 2012 Labour Code allows the government to set regional minimum wages based on the minimum living needs of workers and their families, social and economic conditions, wage levels in the labour market, and the recommendation of the National Wage Council.⁴⁷

The National Wage Council is modelled on the Korean Minimum Wage Council, resulting from the initiatives and technical inputs of the International Labour Organization (ILO). The Vietnamese National Wage Council is a new tripartite body established by the 2012 Labour Code. It consists of 15 members, of which five represent the MOLISA, five represent the

42. Văn Phúc (2014).

43. Đặng Quang Điều (2012), pp. 18–19.

44. *Ibid.*, pp. 4–5.

45. P.V. (2014).

46. Nguyễn Văn Thắng (2014).

47. Article 91 Clause 2 of the 2012 Labour Code.

trade union (VGCL), and five members represent the employers' organizations at the central level, namely the VCCI, the VCA, the Vietnam Textile and Apparel Association (VITAS), the Vietnam Leather and Footwear Association (LEFASO), and the Vietnam Association of Small and Medium Enterprises (VINASME). In addition, its technical and standing committee are assisting bodies responsible for conducting surveys and studies, and developing options regarding regional minimum wages to be discussed at the National Wage Council meetings.⁴⁸

The establishment of the National Wage Council demonstrates a positive approach in promoting social dialogue at the national level on the part of the government. However, policy-makers do not view the National Wage Council as a collective bargaining mechanism at the national level. The 2012 Labour Code only recognizes two levels of collective bargaining, namely sectoral and enterprise collective bargaining.⁴⁹ Sectoral trade unions and employer organizations are involved in sectoral collective bargaining comprises, and enterprise trade unions and employers are involved in enterprise collective bargaining.⁵⁰

Instead, the National Wage Council acts as an advisory body to the government in adjusting and announcing regional minimum wages.⁵¹ It meets four times per year. The meetings in May, June, and July aim at preparing minimum wage proposals for the following year to be submitted to the government for approval. Its operations are financed by the state budget.⁵²

The National Wage Council undoubtedly plays an important role in minimum wage determination, particularly given weak collective bargaining mechanisms at the enterprise level. However, according to my observations, this body is unable to formulate a minimum wage rate that reflects the situation of the labour market and ensures a free consensus and balance of power between employers and workers, due to the lack of legitimate representation characteristic of these social partners.

The participation of the three new business associations, VITAS, LEFASO, and VINASME, in the National Wage Council represents the government's positive commitment to create opportunities for business associations other than those afforded by the VCCI and VCA, to voice the opinions of employers on issues relating to minimum wages. However, similarly to the VCA and VCCI, these associations are unilaterally selected by the state. There are neither objective nor transparent criteria for selecting organizations representative of employers. In addition, on the employers' side, the VCA represents co-operative members who are beyond regulation by the Labour Code.

In practice, while preparing the minimum wage proposal, the VCCI voiced their arguments and proposals in response to the minimum wage increase proposed by the VGCL through different fora, including media and newspapers. Meanwhile, the role of the VCA, VITAS, LEFASO, and VINASME (four of five members from the employers' side) remains

48. Article 5 Clause 4 of Decree No. 49/2013/NĐ-CP.

49. Currently, the ILO assists the VGCL to conduct a pilot initiative on multi-employer collective bargaining with the participation of a number of enterprises operating in the same fields of business, on one side, and the enterprises' trade unions, on the other side, in the industrial zones, processing zones, or in the same localities.

50. Article 69 of 2012 Labour Code.

51. The 2012 Labour Code, Article 92 Clause 1 and Article 3 of Decree No. 49/2013/NĐ-CP.

52. The decision on promulgation of the working mechanism of the National Wage Council term, Article 7 Clause 1 and Article 16 Clause 1, 2013–18.

vague to the public. They do not make public proposals on the minimum wage representing their members from the employers' side. Their limited role in the National Wage Council has led to the belief by the media, newspapers, and public that only the VCCI represents employers in the National Wage Council.⁵³

On the other hand, foreign-invested enterprises are playing an increasingly significant role in the Vietnamese economy. In addition, as mentioned above, wildcat strikes mainly take place in foreign-invested enterprises. However, foreign business associations cannot participate in the National Wage Council.

From the trade union side, due to its monopoly status, the VGCL is automatically selected and occupies one seat as the Deputy President of the National Wage Council, together with two other Deputy Presidents representing the VCCI and VCA. The representatives of VITAS, LEFASO, and VINASME are only members of the National Wage Council.⁵⁴

As a result, adequate representation of all participants in the National Wage Council is doubtful. In addition, how the National Labour Council should work is the biggest challenge for the Vietnamese stakeholders.⁵⁵

2.2 *Restricted Freedom of Association for Both Workers and Employers*

2.2.1 *Restricted Freedom of Association for Workers*

Workers' limited rights to organize have contributed to increased wildcat strikes. Workers are entitled to join trade unions affiliated with the VGCL.⁵⁶ Immediate upper-level trade unions take initiative in union organization and the establishment of workplace trade unions, instead of the rank-and-file workers, as is required by law.⁵⁷ Procedures for forming workplace trade unions are typically controlled by trade unions of the immediate upper level, which contact the employer and request that he/she create favourable conditions for the formation of a trade union in his/her enterprise. If accepted by the employer, the trade union of the immediate upper level will organize a meeting with workers to undertake a campaign on the necessities and benefits of having a trade union in their enterprise. After that, workers who wish to join the trade union will be recruited as members by the trade union of the immediate upper level.⁵⁸

Moreover, for many years, there have been misunderstandings concerning the VGCL's procedures for establishing workplace trade unions. The VGCL does not issue documents requiring employers' signatures in the application dossier for the establishment of workplace trade unions. In practice, immediate upper-level trade unions often urge enterprises and workers to provide employers' signatures in the application letter requesting the immediate

53. For more details, see <http://baodientu.chinhphu.vn/Doi-song/De-xuat-tang-luong-toi-thieu-vung-151/205606.vgp>; online newspaper of the Vietnam Television: <http://vtv.vn/trong-nuoc/hoi-dong-tien-luong-qq-thong-nhat-phuong-an-tang-luong-toi-thieu-2015-153785.htm>; Người Lao động newspaper: <http://nld.com.vn/cong-doan/luong-toi-thieu-tiep-tuc-kien-nghi-2014080621344528.htm>; Pháp luật xã hội newspaper: <http://phapluatxahoi.vn/kinh-doanh/luong-toi-thieu-vung-nam-2015-tang-15-72410>, etc.

54. Decree No. 49/2013/NĐ-CP, Article 5 Clause 1.

55. Tống Thị Minh (2013), p. 2.

56. I have discussed the contemporary practices on trade union organizing in Vietnam in more detail in the article "Trade Union Organizing Free from Employers' Interference: Evidence from Vietnam," 3(3) *Southeast Asian Studies*, December 2014.

57. Article 17 Clause 1d of Vietnam Trade Union Statute.

58. Nguyễn Văn Bình (2011), p. 13.

upper-level trade unions for the establishment of the workplace trade unions, including a recommended list of temporary executive committees of the workplace trade unions (*Ban chấp hành công đoàn cơ sở*).⁵⁹ The employers' signatures in the dossiers on establishment of workplace trade unions are considered proof of the employers' commitment to create favourable conditions for the operation of trade unions in their enterprises.⁶⁰

Before the enforcement of the 2012 Trade Union Law, domestic unionized enterprises and organizations were subject to contribute the equivalent of 2% of the total budget for workers' wages to trade unions' budget.⁶¹ As one of the regulatory packages meant to encourage and attract foreign investment in Vietnam, foreign-invested enterprises were excluded from this requirement. During the revision process in forming the 2012 Trade Union Law, the VGCL insisted on applying this requirement to different enterprises and organizations to guarantee equal treatment between different types of enterprises, particularly between domestic and foreign-invested enterprises. As a result, the 2012 Trade Union Law requires unionized undertakings in different sectors to contribute the equivalent of 2% of the total budget for workers' wages to trade unions' budgets. This requirement is also applied to non-unionized undertakings, including private domestic and foreign-invested enterprises.⁶² In the long term, this provision does not benefit trade unions. In fact, it causes workplace trade unions to be financially dependent on employers.

In 2006, the former President of the VGCL, Cù Thị Hậu, explained why strikes were not organized and led by workplace trade unions in unionized enterprises: she said that trade union officers at the workplace level are employed and paid by the employers. They would be dismissed by their employers for leading strikes.⁶³ Different stakeholders have agreed with this explanation. In a seminar on labour disputes organized by MOLISA in February 2014, a representative of the VCCI reaffirmed that most workplace trade unions are constituted by part-time trade union officers whose wages are paid by the employers. This has led to their reluctance in defending workers' rights and interests for fear of losing their jobs.⁶⁴

However, according to my observations, the reason for this phenomenon is not that employers pay the wages of part-time trade union officers at the workplace level. Rather, it is because the rights of workers to freely choose their trade union representatives is constricted, contributing to a loss of confidence in the trade unions, creating "yellow unions" that depend on employers. In addition, the mechanism to protect workplace trade union officers is weak, resulting in their reluctance to defend workers' rights and interests (see below).

Another cause leading to the weak workplace trade unions is the interference of the immediate upper-level trade unions in the performance of the workplace trade unions. For

59. See the guidance (in Vietnamese) of immediate upper-level trade unions, e.g. Federation of Labour of district 1, Ho Chi Minh City, <http://www.llddq1hcm.gov.vn/thutucthanhlapcongdoan.aspx>; Federation of Labour of Binh Tan district, Ho Chi Minh City, http://ldldbinhtanhcm.gov.vn/vn/default.aspx?cat_id=806; Trade Union of industrial zones of Ha Nam province, <http://hanam.gov.vn/vi-vn/bqlckcn/Pages/Article.aspx?ChannelId=39&articleID=60>, etc. for more details regarding procedures in establishing workplace trade unions.

60. Nguyễn Văn Bình (2011), p. 15.

61. Clauses 1 and 2 of Joint Circular No. 76/1999/TTLT/BTC-TLĐLĐ dated June 16, 1999. This Circular was replaced by Decree No. 191/2013/ND-CP dated November 21, 2013, which took effect on January 10, 2014.

62. Article 26 Clause 2 of 2012 Trade Union Law and Article 4 of Decree No. 191/2013/ND-CP.

63. Như Trang (2006).

64. Hoàng Quân (2014).

example, immediate upper-level trade unions can appoint the members of temporary executive committees of newly established workplace-level trade unions. They can also appoint additional members of executive committees and other positions in the standing board of lower-level executive committees.⁶⁵ In practice, immediate upper-level trade unions often select candidates to be elected by the workers for the positions of trade union officers at the workplace level.⁶⁶ The above-mentioned practices constitute major constraints on the rights of workplace trade unions, restricting autonomy in establishing their own statutes and the ability to organize activities and programmes as prescribed by international standards.⁶⁷

In responding to these weaknesses, the 2012 Trade Union Law allows upper-level trade unions to organize and lead strikes in non-unionized enterprises as mentioned above. One of the reasons for this, from the law-makers' point of view, is that upper-level trade unions are independent from employers. However, the VGCL and its affiliates are dependent on the CPV and government for both their personnel and financial capacities.

First, the VGCL receives financial support from the state as prescribed by law.⁶⁸ This creates the possibility of interference in the operations of trade unions by the state. Second, full-time trade union cadres working at upper-level trade unions are also public cadres and civil servants.⁶⁹ The VGCL does not have absolute autonomy in deciding on the number of trade union officers. It develops the organizational structure and number of trade union officers to decide under its competence or submit to the competent authority⁷⁰ for decision.⁷¹ Moreover, the leaders of different level trade unions within the VGCL system concurrently hold positions in authoritative bodies. For example, the President of the Federation of Labour in Ho Chi Minh City, term 2013–18, is also a member of the Communist Party of Ho Chi Minh City, Secretary-General of the Communist Party, and President of the People's Committee of Nha Be district. The President of the VGCL is a member of the Central Communist Party and the National Assembly. Similarly, other members of VGCL Executive Committees are also members of other authoritative bodies. In addition, the VGCL's statutes must be approved by the CPV before they can be enforced. This can be considered a violation to trade unions' right to draw up their own constitutions and rule freely as prescribed by international standards.⁷²

Since most upper-level trade union officers also enjoy the secure positions of public officials, and the biggest parts of their budgets are financed by the state, upper-level trade unions are similar to administrative bodies. These circumstances negatively affect upper-level trade unions in defending workers' rights and interests, including organizing and leading strikes without interference from third parties such as the CPV and government.

65. Vietnam Trade Union Statute, Article 13 Clause 1.

66. Tổng Văn Công (2013).

67. Paragraph 349 of the Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 1996.

68. The 2012 Trade Union Law, Article 26 Clause 3.

69. Law on public cadres and civil servants, Article 4 Clause 1, Clause 2; Article 70 Clause 2, November 13, 2008, which took effect on January 1, 2010.

70. The competent authority here refers to the CPV as mentioned in Article 66 Section 6 of the law on public cadres and civil servants.

71. The 2012 Trade Union Law, Article 23 Clause 2.

72. The Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, Paragraphs 333, 336, p. 55, 1996.

2.2.2 *Restricted Freedom of Association for Employers*

The right to organize not only workers but also employers is restricted. The VCCI and the VCA are the only two employers' associations recognized by law in industrial relations.⁷³ However, the VCCI and VCA arose for political reasons, to implement policies of the state and CPV. As a result, authoritative bodies are required to consult the VCCI and VCA on issues of rights and obligations, those that directly relate to the interests of employers under the Labour Code.⁷⁴

In addition, the roles of the VCCI and VCA in industrial relations are not obvious. For example, the VCCI Statute does not mention the role of the VCCI in industrial relations.⁷⁵ More attention is paid to their roles as business associations for promoting trade activities rather than promoting industrial relations. Similarly, the VCA has no formal document clarifying this issue.

Meanwhile, other employer associations, particularly foreign business associations, are becoming more important due to the increased number of foreign-invested enterprises in Vietnam. Foreign employers' associations have gained confidence among their member foreign-invested enterprises in Vietnam. For example, Taiwanese enterprises in Binh Duong province are implementing similar policies on workers in their enterprises in terms of annual wage and allowance adjustment rate. Representatives of the Taiwanese business association participate in meetings organized by local authorities and trade unions related to their enterprises. However, these associations are not legally recognized as organizations representative of employers.

Moreover, the right of employers to organize is being restricted, in terms of the requirement to register in forming employer associations at the authority bodies. The foreign and local employer associations are also required to make periodical operational reports to the authoritative bodies.⁷⁶

2.3 *Ineffective Settlement of Wildcat Strikes*

2.3.1 *Intervention of Competent Bodies at the Occurrence of Wildcat Strikes*

When wildcat strikes occur, the immediate upper-level trade unions should co-operate with the relevant bodies in conciliating and promptly settling disputes to stabilize industrial relations and business and production activities.⁷⁷

In practice, the bodies responsible for settling wildcat strikes consist of the department of labour (management board of the industrial zone), police force, People's Committee, and the labour federation at the district level. Together these constitute "the joint working group."

At the site of the strike, the joint working group conducts meetings with workers to hear their demands. It collects, summarizes, and processes workers' requests. The meetings

73. Decree No. 145/2004/NĐ-CP detailing the implementation of the Labour Code regarding the Vietnam General Confederation of Labour's and employer representatives' opinions consultation to the authority bodies on policies, laws, and labour relations, Article 1 Clause 2, July 14, 2004.

74. Decree No. 145/2004/NĐ-CP, Article 1 Clause 1, July 14, 2004.

75. VCCI Statute, Article 6 Clauses 4 and 11.

76. Decree No. 08/1998/NĐ-CP on the promulgation of foreign employers' associations in Vietnam, Article 5, Article 9 Clause 6, January 22, 1998; Decree No. 45/2010/NĐ-CP on the organization, operation, and management of associations, Article 14, Article 24 Clause 7, April 21, 2010.

77. Guidance No. 1861/HD-TLĐ on the implementation of rights and responsibilities of trade unions in labour dispute and strike settlement, Paragraph 2 Section 1 Item II, December 9, 2013.

between the joint working group and the employer, where the requests of the employees are negotiated, are closed.⁷⁸

Furthermore, despite the positive effects of intervention by the relevant agencies in stopping the occurrence of wildcat strikes, such interventions also have a negative impact. They contribute to the occurrence of unlawful strikes that are inconsistent with legal requirements. Moreover, the involvement of different stake holders, such as trade unions, governmental bodies, etc., to resolve a strike on the spot without having exhausted the required formal mechanism of resolution of industrial collective disputes from competent bodies.⁷⁹

Moreover, in practice, the workers' demands are often settled; the days on which they are on strike are paid by their employers. This decision arises, in part, from the attitude of support given to workers by members of the "joint working group" who believe workers' demands are generally legitimate and reasonable.⁸⁰ In addition, there has been a bureaucratic settlement of strikes from the above-mentioned bodies in order to quickly solve the strikes. This bureaucratic settlement of strikes does not encourage the enterprises and workers to settle their industrial collective disputes through conciliation and negotiation.⁸¹

This has given rise to a negative precedent, making workers believe compliance with the official mechanism for collective labour dispute resolution is unnecessary. Such a precedent is a serious threat to public order.

The 2012 Labour Code regulates a measure applied to strikes that have not respected the legal procedures, such as the procedures for soliciting opinion of the worker's collective, and notice of the starting time of strikes. Accordingly, the Presidents of the provincial People's committees will declare that a strike has violated the required statutory procedures. Within 12 hours of receiving the decision by the Presidents of the provincial People's committees' declaring that a strike violates the required statutory procedures, the Presidents of district People's committees, trade unions, district-level departments of labour, and other relevant agencies contact the respective enterprises to consult with the employers and grass-roots trade unions (or upper-level trade unions in the cases of non-unionized enterprises) to find solutions for handling disputes.⁸²

2.3.2 *Legal Consequences of Illegal Strikes*

When a strike is declared illegal (having immediate enforcement), workers have to stop striking immediately and return to work. Those who do not stop striking and return to work, depending on the extent of the violation, are disciplined in accordance with labour laws.⁸³ In the case of a strike that is declared illegal by the competent court and causes damages to the employer, the damages are compensated by the trade union that organized and led the strike. The VGCL recently

78. Vietnam General Confederation of Labour (2008), p. 54.

79. Under Article 203 of the 2012 Labour Code, bodies competent to resolve right-based collective labour disputes include: the labour mediator; chairperson of the People's Committee at district level; People's Court. Bodies competent to resolve interest-based collective labour disputes include the labour mediator and the labour arbitration council.

80. Centre for Industrial Relations Development (2014).

81. *Ibid.*

82. The 2012 Labour Code, Articles 212, 213, 222.

83. 2012 Labour Code, Article 233 Clause 1.

introduced a provision on paying compensation for illegal strikes organized by workplace-level trade unions that cause damages to employers as prescribed by the Labour Code.⁸⁴

This provision shows a positive commitment on the part of the VGCL in holding individuals and organizations responsible for paying compensation for organizing illegal strikes and causing damages to employers. However, the VGCL does not promulgate any provision on paying compensation for illegal strikes organized by upper-level trade unions in non-unionized undertakings and causing damages to employers as prescribed by the Labour Code. In addition, employers do not pay workers for strike days. However, the VGCL has not formulated any regulations on nor does it have a strike fund to pay allowances to workers for days on strike when organized and led by trade unions. In practice, there are no reported cases showing the VGCL has compensated for strikes.

2.3.3 *Why Aren't the Leaders of Wildcat Strikes Sanctioned?*

In 2006, the former Deputy Minister of MOLISA, Lê Duy Đồng, stated the following:

The spontaneous strikes took place in the past years did not mean that they were not organized. They in fact, were organized unofficially by the workers without the leadership of the trade unions. Many strikes organized by the workers without the trade unions gained success. So, should we acknowledge this matter of fact?⁸⁵

No changes have occurred in the last over eight years. Wildcat strikes have been organized primarily by workers in their respective enterprises. According to an officer of the ILO Country Office for Vietnam, Nguyễn Văn Bình, in the past, strike leaders were called “black leaders,” meaning they were “unidentified.” However, since strike leaders have no longer gone as “unidentified” in recent years, the more general term of “informal/unofficial strike leaders” has come to take its place.

Despite increasing wildcat strikes, no strikers have been sanctioned by law.⁸⁶ Although strike leaders are recognized by workers, enterprises have been unable to identify them. According to the Labour Code, in the course of a strike—or within three months of the termination of a strike—either party is entitled to file a case to the court to review the strike’s legality.⁸⁷ In practice, since the enforcement of the 1994 Labour Code, Labour courts have not received any requests to review the legality of strikes due to the employers’ failure to identify striker leaders.⁸⁸

In addition, the political response to wildcat strikes has not been black and white. Unlike neighbouring countries like China and Cambodia, the Vietnamese government takes a tolerant attitude towards wildcat strikes. On the one hand, this attitude is caused by the understanding that workers’ wages are too low to afford the costs of living. The VGCL, which plays a significant role in Vietnam’s contemporary political system, has conducted numerous surveys

84. Decision No. 171/QĐ-TLĐ on revenue, expending and managing finance of workplace-level trade unions, Article 6 Section 4 b, January 9, 2013.

85. Thái An (2006).

86. After the political strikes conducted by workers against Chinese companies in certain province cities in Vietnam in May 2014, due to a Chinese oil rig’s deployment into disputed waters, the Vietnamese government had to pay compensation for damages caused by the Vietnamese workers to the Chinese enterprises. However, these political strikes are beyond the scope of this article.

87. The 2012 Labour Code, Article 223.

88. Lam Sơn (2013).

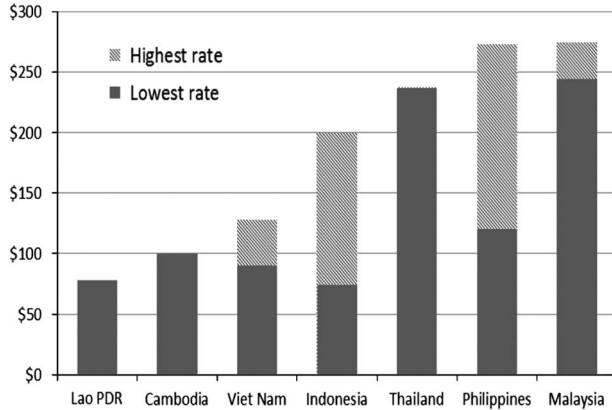


Figure 1. Monthly minimum wage in Southeast Asian countries, 2014 (US\$) (from Luebker, 2014).

on the low living standards and incomes of workers and announced these in the media to advocate an increase in the minimum wage as promulgated by the government.

On the other hand, the government has to balance between pressures to increase workers' wages and efforts to attract foreign investment; cheap labour is still seen as one of the significant reasons for foreign investment in Vietnam. Compared with other countries in Southeast Asia, particularly the Philippines, Indonesia, and Thailand, the minimum wages of Vietnamese workers are much lower (see Figure 1).

3. PROPOSED SOLUTION TO THE PROMOTION OF THE RIGHT TO STRIKE IN THE PRIVATE SECTOR

In a recent seminar organized by the MOLISA, participants proposed that employing dialogue and collective bargaining would certainly prevent strikes. To enable dialogue and collective bargaining, according to the participants, workers should be made better aware of their rights, and their benefits should be improved; trade unions should actually represent and protect workers to gain workers' confidence; and measures should be taken to protect trade unions before, during, and after strike settlements.⁸⁹ Their proposals are correct. However, from my observations, these measures are neither sufficient nor do they address the roots of the problem regarding wildcat strikes.

On the basis of the above analysis concerning problems regarding wildcat strikes in the private sector, I propose the following to promote the right to strike in Vietnam's private sector.

3.1 Removal of Legal Restrictions on Freedom of Association and the Right of Workers to Organize

3.1.1 Freedom of Association and the Right of Workers to Organize

Since "đổi mới," the VGCL has committed to reforming its operations and has affirmed that its major function is to represent and protect workers' rights. However, the increasing

89. Centre for Industrial Relations Development (2014).

number of wildcat strikes implies that workers are “turning their backs” on the current trade union movement. The new Labour Code embodies significant changes in terms of collective labour disputes and strike resolutions aimed at solving the problem of increased wildcat strikes. However, it is likely that the root causes of strikes have not been dealt with, of which one of the major causes is a restriction in the freedom to associate and the right of workers to organize, as mentioned above.

It is necessary to develop a trade union movement independently of employers. Employers and managerial officers should not be trade union members, or vice versa, where a trade union member would also be the employer, as mentioned above.

In addition, the development of a trade union movement that is independent from authoritative bodies is necessary. The interference of authorities into the organization and operations of the VGCL and its affiliates is incompatible with international standards regarding a freedom to associate, according to which workers should be entitled to form organizations independently of both pre-existing ones and political parties.⁹⁰ Therefore, the VGCL and its affiliates should be able to choose their own personnel without interference from authorities. In addition, to ensure a principle of independent operation, leaders of the VGCL should not at the same time hold positions in authoritative bodies.

It is obvious that, when workers’ rights to organize are respected, there will be more trade unions that act as actual representatives of workers, contributing to the elimination of “yellow unions.” The question is whether it is possible to maintain freedom of association in Vietnam under ILO Convention Nos. 87 and 98.

Although Vietnam has joined neither ILO Convention No. 87 nor Convention No. 98, it is obliged to accept the principles of freedom of association.⁹¹ In 2006, the Vietnamese government expressed its opinion on the ratification of Convention Nos. 87 and 98 in co-operation with employers’ and workers’ organizations. In 2008, the VGCL did not support the ratification of Convention Nos. 87 or 98.⁹² However, the Vietnamese government will not join the ILO Convention Nos. 87 and 98 in the period from 2012 to 2020.⁹³ The VGCL continues to be the only trade union operating under the leadership of the CPV as acknowledged by law.⁹⁴

However, there are a number of international incidences that will cause the Vietnamese government to further consider freedom of association under ILO Convention Nos. 87 and 98. Most recently, Vietnam is the only ASEAN member which has been elected as a member of the UN Human Rights Council on November 13, 2013. In its application to the Human Rights Council, Vietnam committed to “Adopt policies and measures and increase resources to better ensure all fundamental economic, social, cultural, civil and political human rights in line with internationally recognized norms.”⁹⁵

90. The Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, Paragraph 273, p. 45, 1996.

91. The Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, Paragraph 10, p. 10, 1996.

92. International Labour Organization (2008).

93. Document No. 4718/VPCP-QHQT of the Office of the government on joining the ILO Conventions and relevant international treaties and agreements, June 28, 2012, and Directive No. 01/CT-TTg of the Prime Minister on a number of measures to implement the proactive international integration policy, January 9, 2012.

94. The Constitution, Article 9 and Article 10 and the 2012 Trade Union Law, Article 1.

95. United Nations (2013), p. 5.

Another important event is that Vietnam has been negotiating the Trans-Pacific Strategic Economic Partnership Agreement (TPP) since 2010, which is considered its most important trade agreement, having the greatest impact on its national economy in coming years.⁹⁶ The TPP not only brings opportunities for economic development in Vietnam, but it will also require that the Vietnamese government promote labour rights.

3.1.2 More Commitments are Needed to Protect Part-Time Trade Union Officers at the Workplace Level

The 2012 Trade Union Law provides a better protection mechanism for workers working as part-time trade union officers at the workplace level. They enjoy more job security than other workers in their enterprises. If the employment contract expires while the workers still hold offices in the local trade union's executive committee, they will continue their jobs until the end of the trade union term.

Dismissal, meaning, for example, the unilateral termination of an employment contract by employers of a worker who is a member of a local trade union executive committee, requires the consent of that committee. If a worker is the president of the workplace trade union, the consent of the executive committee of the trade union organization of the immediate upper level is required.⁹⁷ However, there is no difference between the sanction applied to employers for illegally terminating the employment contracts of workers who are union officers and those who are ordinary workers.⁹⁸ No special mechanism exists for imposing sanctions on employers for anti-trade union acts. As the result, it is necessary to develop regulations that provide for stricter sanctions to employers for illegally terminating the employment contracts of workers who are union officers, versus the rank-and-file workers, to guarantee the job security of part-time trade union officers against anti-union acts committed by employers.

If part-time trade union officers are illegally dismissed, then trade unions can make a request for intervention by competent authorities, representing part-time trade union officers in bringing the case to court if authorized. At the same time, trade unions should help part-time trade union officers find new jobs and provide them with allowances during their time out of work.⁹⁹ However, in practice, there is hardly any evidence that upper-level trade unions are committed to reporting anti-union acts committed by employers to be settled by competent bodies in accordance with law. The commitment of the VGCL and its affiliated trade unions is needed in identifying anti-union acts committed by the employers to be dealt with by law.

3.2 How Should the National Wage Council Work?

To guarantee the appropriate development of regional minimum wages, it is important that genuine representatives of both workers and employers be engaged in the process. This means that the selection of employer and worker organizations participating in the National

96. The TPP is being negotiated among 12 countries, comprising the US, Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and Japan.

97. The 2012 Labour Code, Article 192 Clause 7.

98. When a labour contract is illegally terminated, the employers must re-employ the employee and pay compensation equal to the amount of wages and additional allowances (if any) corresponding to the period the worker was not allowed to work, and an additional compensation of at least two months' wages plus allowances (if any), as mentioned in the 2012 Labour Code, Article 42 Clause 1.

99. The 2012 Trade Union Law, Article 25 Clause 3.

Wage Council should be based on objective and transparent criteria (e.g. the scope of operations, percentage of membership, etc.) as prescribed by law. This would enable the involvement of employers' organizations that are influential among employers, guaranteeing the participation of organizations that genuinely represent employers and workers, so that the voices of employers and workers are truly represented and minimum wage rates reflect the actual situations of the labour market.

In addition, as a measure to guarantee freedom of association, foreign business associations should be allowed to participate in the National Wage Council.

3.2.1 *How Should Wildcat Strike Settlements Be Dealt With?*

The intervention of "joint working groups" in wildcat strike settlements shows the tolerant attitude the Vietnamese government takes towards these strikes. As a result, in most wildcat strikes, employers pay workers for strike days. However, the intervention of "joint working groups" is inconsistent with the overall legal mechanism on collective labour dispute resolutions in terms of the bodies competent to resolve collective industrial disputes as mentioned above. Issues at the heart of these strikes should be brought to competent bodies responsible for the resolution of collective industrial disputes. Indeed, many strikes have occurred due to a lack of local negotiations and conciliation between the two social parties themselves. According to an employer of the Furukawa Company in the Tan Thuan processing zone, District 7 of Ho Chi Minh City, due to an increase in the price index, the lives of workers are becoming more difficult. The claims of workers for rights and benefits are legitimate. However, such claims were not brought to the company's manager. Instead, workers used the strike to voice their claims. This is very common and not in compliance with the law.¹⁰⁰

3.3 *Guaranteeing the Right to Strike in Undertakings of "Non-Essential Services"*

The right to strike is not an absolute right. It may be restricted or prohibited in cases of essential services, services whose interruption would endanger the life, safety, or health of part or the whole of the population.¹⁰¹ This principle might lose its meaning if strikes were declared illegal in undertakings of non-essential services.¹⁰²

The 2012 Labour Code prohibits strikes in enterprises providing essential services to the national economy, where strikes could create a threat to security, defence, public order, and health. These include the following: large-capacity power production, transmission and moderation of the national electrical system, the exploration and exploitation of oil and gas, production and supply of gas, assurance of air and maritime safety, telecommunication,

100. Ngoc Lữ (2008), p. 109.

101. According to Paragraphs 585 and 587 of the Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006, the following may be considered essential services: the hospital sector; electricity services; water supply services; the telephone service; the police and the armed forces; the firefighting services; public or private prison services; the provision of food to pupils of school age and the cleaning of schools; air traffic control. The following do not constitute essential services: radio and television; the petroleum sector; ports; banking; computer services for the collection of excise duties and taxes; department stores and pleasure parks; the metal and mining sectors; transport generally; airline pilots; production, transport, and distribution of fuel; railway services; metropolitan transport; postal services; refuse collection services; refrigeration enterprises; hotel services; construction; automobile manufacturing; agricultural activities, the supply and distribution of foodstuffs; the Mint; the education sector; mineral water bottling company.

102. The Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, Paragraphs 573, 583, 2006.

postal services for state bodies, and the provision of clean water, drainage, environmental sanitation in cities under central administration, and other services that directly serve the public security and defence.¹⁰³ The list of essential services promulgated by the Vietnamese government does not fully meet the international standards. It restricts the rights of workers and trade unions to strike.

Moreover, the Vietnamese Labour Code grants the chairperson of the People's Committee at the provincial level the right to postpone or cancel strikes if he/she finds that they present a risk of serious damage to the national economy or public interest.¹⁰⁴ This provision is vague and not based on any objective criteria. As a result, it prevents both workers and trade unions from exercising their right to strike.

The above-mentioned legal restrictions on strikes should be revised in order to comply with the international standards and guarantee the right to strike of workers and trade unions in Vietnam's private sector.

4. CONCLUSIONS

The 2012 Labour Code recognizes that workers in the private sector have the right to strike under the organization and leadership of trade unions. Due to the reasons mentioned above, no strikes that have occurred in Vietnam have been recognized as lawful. It is unclear how the VGCL and its affiliations are implementing this new task. There are two alternatives concerning wildcat strikes in the private sector. First, if the restricted freedom of association of both workers and employer is not removed, wildcat strikes will continue to take place, despite the promulgation of the 2012 Labour Code that simplifies the legal procedures regarding strikes. The second alternative might be able to settle the problem of wildcat strikes. This alternative lies within the current political system, including the CPV, VGCL, and other relevant stakeholders. It is time for the VGCL and its affiliates to take greater responsibility in acting as actual representatives of workers' collectives. Social and cultural activities organized by the socialist trade unions that began while the economy was centrally planned—which continue to be organized by the VGCL and its affiliates, such as the organization of sport events, recreational and entertainment activities for workers, etc.—are no longer suitable activities to be undertaken by unions in the market-based economy. Developing organizations actually representative of both employers and workers for developing labour policies and regulations—including minimum wage development, social dialogue, collective bargaining and collective bargaining agreements at different level, and strictly following the formulated regulations on collective industrial disputes—are among the most important measures to be undertaken to prevent wildcat strikes in Vietnam's private sector.

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103. The 2012 Labour Code, Article 220 and Decree No. 41/2013/NĐ-CP, Article 2 Clause 1, May 8, 2013, detailing the implementation of Article 220 of the Labour Code on the list of undertakings where strikes are prohibited and settlement of demands of the workers' collective in the undertakings where strikes are prohibited.

104. The 2012 Labour Code, Article 221.

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