

Vietnamese marriage and family law on divorce: From the perspective of The feminist legal theory

Ngo Minh Phuong Thao*



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ABSTRACT

Although The feminist legal theory has been relatively new and still unfamiliar in Vietnam for many years, its contents, interestingly, are closer than ever that we can easily learn from Vietnamese laws with the significant changes through our long history. Perhaps, law is an instrument of social change which means that the movement of society always has great impact on the change of legal system. Undoubtedly, marriage and family law, probably more than any other law, clearly reflects the characteristics of women like reproduction and child rearing. Therefore, engaging this law with feminist perspective will enable us to find out more about women status, their thought, how social economics and cultural factors affect their decisions. The feminist legal theory also sheds light on structural and entrenched gendered disadvantages that are perpetuated. In general, the legal terms of marriage and family law 2014 state that there is no distinction between husbands and wives with respect to marital property distribution, custody disputes and so on. In other words, the spouses have equal role in their family in which the law provides the same benefits, rights and responsibilities to all parties without gender-based discrimination. In contrast, the theory – practice gap is still overwhelming. This essay will point out some inequality matters when Vietnamese courts handle cases in relation to the spouses' matrimonial property during a divorce process as well as emphasize the nature of mothering or nurturing of children at the dissolution of marriage. Further, the essay also addresses, to a limit extent, Vietnamese family law from the light of The feminist legal theory and answer the question whether marriage and family law protect sufficiently women's rights or not.

Key words: The feminist legal theory, marriage and family law, woman's right, gender equality

INTRODUCTION

Throughout many decades of relentless struggle, the vital role of women has been adequately recognized at present, especially in progressive countries. Developing during that time, the feminist legal theory is an important theoretical foundation to promote gender equality over the legal system of each nation. This theory is an extremely valuable reference for developing countries, particularly ones in Asia and Africa where the position of women is always underestimated compared with men for thousands of years. These nations can gain experience, approach new ideology and apply this theory in the process of law-making. Fortunately, the Communist Party of Vietnam and the government have paid great attention to gender equality policies and used the law as one of the most effective tools to achieve equal rights between the sexes since 1945.

The provisions of Vietnamese law have clearly demonstrated their role in ensuring gender equality, particularly, the law on marriage and family. However, after carefully reviewing the content of the current marriage and family law on divorce, the author found that,

apart from the achieved results, there are still some inadequacies that need to be modified. On the basis of the feminist legal theory and Vietnamese social reality, the author will, to a limit extent, propose some basic solutions to overcome the above shortcomings, thereby, partly contribute to close the gender gap, improve the status of women in society, towards a fair and civilized society in Vietnam.

THE MARRIAGE AND FAMILY LAW 2014 REGULATIONS ON DIVORCE AND THE LENSES OF THE FEMINIST LEGAL THEORY

In a sense, family policy reflects the effectiveness of a social institution. The Law on Marriage and Family 2014 has many legal norms to maintain the equal treatment between men and women on the grounds that indirectly protect women's rights such as Article 2, Article 5, Article 8, Article 47, Article 51 and Article 81. These rules indicate that equality does not mean treating spouses identically, but rather requires recognition and validation of differences. Equality re-

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History

- Received: 16-9-2021
- Accepted: 24-8-2022
- Published: 01-9-2022

DOI : 10.32508/stdjelm.v5iS12.1121



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Cite this article : Thao N M P. Vietnamese marriage and family law on divorce: From the perspective of The feminist legal theory. *Sci. Tech. Dev. J. - Eco. Law Manag.*; 5(S12):166-170.

quires protection and support for women in their reproductive role the same as the level of protection and support accorded to men in their productive role¹. According to the author's survey, Vietnamese courts have properly applied the provisions of this law to resolve disputes concerning the spouses' marital property distribution upon divorce, including child rearing matter. Judges focus on the weaker – woman/wife to consider and decide a case. For instance, a judgment no. 31/2017/HNGĐ-PT of People's court of Dong Nai province² cited that, a wife and her husband had a dispute related to the ownership of a residential house attached to land in which they used to live happily together. While the husband argued that this house with land use rights belonged to him, the wife desired to continue living in it because the house was the only residence of herself and her daughter. Both trial court and appeal court concluded that the wife owned this house but she had to pay the difference in the value of it to her ex-husband. It can be seen that, the courts considered the wife's disadvantages and came down in favor of her. This is a typical judgment which demonstrates the effectiveness of law and appropriate solutions given by the court to protect women in Vietnam.

It is apparent that everything is not always perfect. The law still contains some drawbacks at both theoretical and practical level when we use the feminist legal theory approach to evaluate. Now, the essay will analyze some specific issues to clarify the above idea. Firstly, this essay will mention the rule of matrimonial property regime. Article 47 of the Law on Marriage and Family 2014 asserts that the spouses can choose matrimonial property regime, established before marriage. Based on this agreement, parties easily divide their marital property (child custody, if any) in case they get a divorce. Unless there is a nuptial agreement, each spouse will waste much time and effort to take legal action against her/his counterpart in court. Nevertheless, the matrimonial property regime is bound to meet all elements regulated in Article 48, Article 49 and Article 50 of this law with respect to the form and content, particularly, this agreement must ensure the equality of spouses without discrimination between monetary and non-monetary contributions (Article 29). Furthermore, the property distribution of spouses must also protect women and children (clause 5 Article 59).

Obviously, the Law on Marriage and Family 2014 has developed and demonstrated such manifestations of gender equality compared to the Law on Marriage and Family 2000 since it regulates spouses' community property agreement. The matrimonial property

regime or prenuptial agreement has been rarely applied in Vietnam because of the cultural and social-economic reasons. However, the author believes that in the future, people tend to use it as an effective legal tool to protect and promote their rights, primarily in marriage and family relations involving foreign elements. These regulations in relation to matrimonial property regime, actually, are quite difficult to apply in practice.

Importantly, a competent court needs to consider that even spouses sign a prenuptial agreement, besides prioritizing autonomy, the court must recognize each party's undue influence of power disparities. It means that, at the time they conclude a marital property regime agreement, spouses have a thorough understanding of this contract. The feminist aspect of this approach is vital because it is particularly sensitive to the fact that career sacrifices or other changes in circumstance may affect women more if the prenuptial agreement has not provided for these changes [3, pp.634]. As the result, one party is not bound by the agreement so spouses' matrimonial property will be divided in accordance with the law. It cannot be denied that the role of competent court is really important in analyzing and applying law on a case by case basis^{a 1}.

Notably, the current law only mentions marital property agreement, excluding legal separation. Therefore, if a woman has to raise her baby and she does not work out but only invests domestically, how prenuptial agreement can ensure their lives while she and her husband are separating. Even when she has a stable job, the result is not completely different. The World Bank Document (2018) showed that Vietnamese women generally earned less than men (approximately 3 million VNĐ per month), they also worked in lower paid occupational sectors so that they could have a significant amount of time to take care of their family. This leads to the solution that lawmakers should implement the terms of a separation agreement or separation status in the marriage and family law. On the one hand, women (also children) can be better protected by law, clarify civil and economic transactions performed by spouses. On the other hand, they have enough time to be completely independent thinking about their marriage, whether they still live together before they decide to end their marriage. Indeed, women' divorce experience is not easy.

^aIn fact, the High Court of Australia proved the influence of The feminist legal theory on prenuptial agreement through *Thorne vs. Kennedy* case [2, pp. 637-638].

Secondly, the essay focuses on marital property distribution of divorcing spouses. According to the current marriage and family law, each is entitled to half the value of family property but there are always exceptions to the rule, regulated at clause 2 Article 59. This law has emphasized the equalization concept where the value of marital property is divided equitably between spouses. Women have a chance to achieve equality and have the potential and opportunities to be financially self-sufficient regardless of their work status, inside or outside the home. These notions represent some of the more generalized and problematic aspects of both the feminist and legal system's ideologies⁴.

Some feminists argue that even if women were awarded half of all marital property, they would still be at a financial disadvantage in some cases. In view of the fact that spouses have the same function in the contribution and acquisition of common property, reproductive responsibilities and childcare have put women at a disadvantage during marriage and after divorce. A wife as a mother is defined to include all aspects such as companionship, homemaker, nanny, emotional and physical sustenance woman, etc. In addition, women are more likely to have deferred their education and careers for marriage. To emerge from a divorce in a position that even begins to put them on an economic par with their ex-husbands, many women need to receive more in property distribution than the strict equality concept⁵. Consequently, some special privileges or support are necessary to compensate and put women on an equal, competitive footing with men, especially in the marital property distribution upon divorce [1, pp.116]. Summarily, in a specific case, the court must consider all the necessary elements to resolve spouses' marital property.

For example, a husband and wife got a divorce at the People's Court of Yen Lac district (Vinh Phuc province)⁶. Their matrimonial property includes a house with land use rights and a land with fruit trees. The husband requested the court to divide their property into thirds, he took two thirds and the rest was owned by the wife. Unfortunately, the court accepted his claim without taking into account the wife's great contribution. It can be seen that this judgment did not ensure women's rights and interests.

Another case is, a wife sued her partner at the People's Court of Bac Ninh province in 2019. They had some valuable marital properties. Yet, the husband took all the properties because he insisted that they belonged to him. Both trial court and appeal court disagreed with him. Judges argued that spouses established property with equal contribution, so they deserved half of property division. This judgment may

be equal, but I wonder if the judges should consider the fault of the husband. Definitely, he lived with another woman and always had bad behavior with his wife. Moreover, he used a lot of tricks to make communal property into separate property such as these properties were registered in the name of his relatives. In addition, the wife had to use those divided assets to support two children. Therefore, it is more reasonable if she holds in proportions of two with respect to common property. This distribution is legal since clause 2 Article 59 of the Law on Marriage and Family 2014 also states that each party can receive half of all marital property but counts for some factors including spouse's faults in the infringement of spousal rights and obligations. Unfortunately, it appears that the courts ignored this provision in some prominent cases.

Finally, this paper will address the basic function of women, namely getting custody of their children after divorce. Vietnamese courts tend to grant custody of the child to his/her mother in accordance with the law (clause 4 Article 2 and clause 3 Article 81). From the point of view of feminist, mothering and fathering have different role, mothers tend to be intensely involved in their children's lives and tend to have greater empathy for their children⁷, which means that, apart from some cases, mothers will be in anguish whenever they lose custody of their children. The irreplaceable role of a mother comes inevitably from the biological links between them. Sometimes, Vietnamese judges forget that women invest more emotionally in children than their partners or they decide the father has the right of child rearing although he lacks economic conditions in comparison with his counterpart.

The judgment issued by the People's Court of Ninh Kieu district (Can Tho city) awarded that the mother had the right to bring up her son though her ex-husband raised him before. The court held that the mother had adequate conditions to take care of her child and more importantly, she is a mother. However, the Appeal People's Court of Can Tho city refused this judgment and declared that the son must be reared by his father. Fortunately, the High People's Court in Ho Chi Minh city upheld the first-instance judgment. In short, the mother spent two years getting custody of her son. At that time, the kid was just 5 years old, he needed his mother's love and care.

In fact, there are many circumstances where children want to live with their mother but she has a lower standard of living than their father and in these cases, the judges have a tendency to determine the father will look after them. Even if their father prohibits them from meeting their mother, the woman cannot sue

her ex-husband to court because she does not have enough finance and knowledge as well. Certainly, the rights of women (and children) are not guaranteed while the legal rules just regulate quite vaguely. Sometimes, the courts ignore the extraordinary effort of a mother to get custody of her child.

CONCLUSION

This essay emphasizes some concerned matters in current marriage and family law with the lens of the feminist legal theory. Basically, Vietnamese law as well as Vietnamese family courts respect the women protection principle. This is extremely progressive because family is the most gendered institution in our society and therefore, one that should receive serious feminist scrutiny⁸ or it can be pointed out that this theory impacts in a deep – rooted way on law making process. In some cases, however, the law is still unclear, which makes the judges neglect women's position and infringe on their rights as well. Feminism is a reference theory for judges to ensure women's interests in society, particularly regarding marital property division and child rearing at the dissolution of marriage. However, it does not mean that the courts only focus on women, but remember to be equal for both.

ACKNOWLEDGEMENT

The article in this Special Issue of the STDJELM is selected from the International Conference on Feminism, Gender and Law held virtually in October 29,

2021. The publication and the Conference were organized and sponsored by the University of Economics and Law, VNU-HCM, and the Rosa-Luxemburg-Stiftung Southeast Asia, Hanoi office.

COMPETING INTEREST

The author declares that they have no conflicts of interest.

AUTHOR'S CONTRIBUTION

All content of the article is done by the author only.

REFERENCES

1. Spakes P. Equality and family policy in international perspective: toward a Feminist theory of the State. *J Sociol Soc Welf.* 1996;23(1):113-30;
2. Supreme People's Court. Judgment of the People's Court of Dong Nai province on marriage and family disputes 2017 [online] [cited Aug 31 2021]; Available from: <https://congboanan.toaan.gov.vn/2ta20122t1cvn/chi-tiet-ban-an>.
3. Thompson S. Feminist relational contract theory: new model for family property agreements. *J Law Soc.* 2018;45(4):617-45; Available from: <https://doi.org/10.1111/jols.12132>.
4. Edwards PE. Gender issues in family law: A Feminist perspective. *Fam Conciliation Courts Rev.* 1997;35(4):428; Available from: <https://doi.org/10.1111/j.174-1617.1997.tb00485.x>.
5. Levit N, Verchick RRM. *The feminist legal theory.* 2nd ed. New York: New York University Press; 2016. p. 185;
6. Ho Chi Minh city legal newspaper. Protest due to Court division of assets in shortage and surplus 2021 [online]; 2021 September 03 [cited Aug 31 2021]; Available from: <https://plo.vn/phap-luat/khang-nghi-do-toa-chia-tai-san-cho-thieu-cho-thua-1012918.html>.
7. Carbone JR. A feminist perspective on divorce. *Future Child.* 1994;1: 197-4; PMID: 7922279. Available from: <https://doi.org/10.2307/1602484>.
8. Albertson FM. Feminist theory in law: the difference it makes. *Columbia J Gend Law.* 1992;2:5.

Luật hôn nhân và gia đình Việt Nam về ly hôn: Từ góc nhìn của Lý thuyết pháp luật nữ quyền

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TÓM TẮT

Mặc dù Lý thuyết pháp luật nữ quyền còn tương đối mới và xa lạ ở Việt Nam trong nhiều năm qua, nhưng điều thú vị là, nội dung của Lý thuyết này gần gũi hơn bao giờ hết mà chúng ta có thể dễ dàng bắt gặp trong các quy định của pháp luật Việt Nam với những thay đổi đáng kể trong suốt chiều dài lịch sử. Phải chăng, pháp luật là công cụ của sự thay đổi xã hội, nghĩa là sự vận động của xã hội luôn có tác động lớn đến sự thay đổi của hệ thống pháp luật. Không còn nghi ngờ gì nữa, luật hôn nhân và gia đình, có lẽ hơn bất kỳ ngành luật nào khác, phản ánh rõ nét nhất những đặc điểm của người phụ nữ như chức năng sinh sản và nuôi dạy con cái. Do đó, việc nghiên cứu ngành luật này kết hợp với quan điểm pháp lý nữ quyền sẽ cho phép chúng ta hiểu thêm về vị trí của người phụ nữ, tư tưởng của họ, cách thức mà nền kinh tế xã hội và các yếu tố văn hóa ảnh hưởng đến quyết định của họ. Lý thuyết pháp luật nữ quyền cũng làm sáng tỏ những bất lợi về mặt cấu trúc và thành kiến về giới vẫn còn tồn tại. Nhìn chung, các quy định của luật hôn nhân và gia đình 2014 đã chỉ ra rằng, không có sự phân biệt giữa vợ và chồng đối với việc phân chia tài sản chung, tranh chấp quyền nuôi con, v.v. Nói cách khác, vợ, chồng có vai trò bình đẳng trong gia đình, theo đó, pháp luật quy định lợi ích, quyền và trách nhiệm như nhau cho các bên mà không có sự phân biệt đối xử về giới tính. Tuy nhiên, khoảng cách giữa lý luận và thực tiễn vẫn còn quá lớn. Bài viết này sẽ chỉ ra một số vấn đề bất bình đẳng khi Tòa án Việt Nam giải quyết các vụ việc liên quan đến tài sản chung của vợ chồng trong quá trình ly hôn cũng như nhấn mạnh bản chất của việc nuôi dưỡng, chăm sóc con cái khi hôn nhân tan vỡ. Hơn nữa, trong một chừng mực nhất định, bài viết cũng đề cập đến luật hôn nhân và gia đình Việt Nam dưới góc nhìn của Lý thuyết pháp luật nữ quyền và trả lời câu hỏi liệu rằng luật hôn nhân và gia đình có bảo đảm đầy đủ quyền lợi chính đáng của người phụ nữ hay không.

Từ khóa: Lý thuyết pháp luật nữ quyền, luật hôn nhân và gia đình, quyền của phụ nữ, bình đẳng giới

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Lịch sử

- Ngày nhận: 16-9-2021
- Ngày chấp nhận: 24-8-2022
- Ngày đăng: 01-9-2022

DOI: 10.32508/stdjelm.v5iS12.1121



Bản quyền

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Trích dẫn bài báo này: Thảo N M P. Luật hôn nhân và gia đình Việt Nam về ly hôn: Từ góc nhìn của Lý thuyết pháp luật nữ quyền. *Sci. Tech. Dev. J. - Eco. Law Manag.*; 2022, 5(S12):166-170.