

WORKPLACE GENDER EQUALITY IN THE DRC: A CRITICAL ANALYSIS
OF EXISTING LEGISLATION

Author first name: **Mr THEODORE KASONGO**

Family name: **KAMWIMBI**

Email address: kamwimbi@gmail.com

Institution: **KINSHASA/ MATETE BAR, DRC**

Introduction

This paper seeks to critically analyse the different legal, policy and institutional frameworks aimed at achieving gender equality in the workplace in the Democratic Republic of Congo (DRC). The objective of such a research study is to determine whether or not the country complies fully and in good faith with its international obligation to promote gender equality in the workplace. To this end, the paper focuses on four key specific areas related to workplace gender equality: definition of workplace gender equality (1); the principle of equality and prohibition of discrimination in the workplace (2); women's work regime (3); Sexual harassment in the workplace (4); and institutional mechanisms aimed at achieving gender equality (5).

Section 1. Definition of workplace gender equality

The definition of workplace gender equality is articulated in the various international, regional and sub-regional instruments and embodies the three principles of equality,

namely non-discrimination, state obligations and substantive equality.¹ In this respect, the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* refers to elimination of discrimination against women in the field of employment for the purpose of ensuring, on a basis of equality of men and women, the same rights. These include the right to work; the right to the same employment opportunities; the right to free choice of profession and employment; the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining; the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work; the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave; the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.²

In addition, in order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, the *CEDAW* prohibits, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status. It introduces maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances. It also provides for the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and

1 AP Voola *et al.* ‘A “Fair go” in the lucky country?’, in A Ortenblad *et al.* (eds) *Gender equality in a global perspective* (2017) at 101-102.

2 Art. 11(1).

development of a network of child-care facilities. Lastly, it provides for special protection to women during pregnancy in types of work proved to be harmful to them.³

In terms of regional mechanisms, the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol)* guarantees women equal opportunities in work and career advancement and other economic opportunities. In this respect, the *Maputo Protocol* calls for promotion of equality of access to employment; promotion of the right to equal remuneration for jobs of equal value for women and men; and transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace. In addition, the *Maputo Protocol* guarantees women the freedom to choose their occupation, and protects them from exploitation by their employers violating and exploiting their fundamental rights. It also creates conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector, while establishing a system of protection and social insurance for women working in the informal sector and sensitising them to adhere to it. It guarantees adequate and paid pre and post-natal maternity leave in both the private and public sectors. It recognises and enforces the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children.⁴

As regards the sub-regional mechanisms, the *SADC Protocol on Gender and Development* does not define the term 'workplace gender equality', but provides a

3 Art. 11(1).

4 Art. 13.

definition of related terms. Under Article 1, paragraph 2, this Protocol defines the term ‘gender equality’ as ‘the equal enjoyment of rights and the access to opportunities and outcomes, including resources, by women, men, girls and boys’. In this same provision, the term ‘gender equity’ is defined as ‘the just and fair distribution of benefits, rewards and opportunities between women, men, girls and boys’. The term ‘gender mainstreaming’ is defined as ‘the process of identifying gender gaps and making women’s, men’s, girls’ and boys’ concerns and experiences integral to the design, implementation, monitoring and evaluation of policies and programmes in all spheres so that they benefit equally’. Lastly, the Protocol defines the term ‘gender sensitive’ as acknowledging and taking into account the specific gender needs of both men and women at all levels of planning, implementation, monitoring and evaluation’.⁵

Under DRC law, despite the fact that the term ‘workplace gender equality’ is not specifically defined, *Act No. 15/013 of 1 August 2015 laying down detailed rules for the fulfilment of women’s rights and gender equality* provides a definition of related terms, in the same way as the *SADC Protocol* referred to above. The term ‘gender equality’⁶ is defined as a state of being equal in terms of enjoyment of rights and access to opportunities and outcomes, including resources, by women, men, girls and boys.⁷ The term ‘gender equity’⁸ is defined as just and fair distribution of benefits, rewards and opportunities between women, men, girls and boys.⁹ The term ‘gender equity’¹⁰ is

5 Art. 1 (2).

6 Originating from the French term ‘égalité entre les sexes’, this term may literally be translated into English as ‘equality between the the sexes’.

7 Art. 3 (5).

8 This term is literally translated from the French term ‘équité entre les sexes’.

9 Art. 3 (7).

10 This term is literally translated from the French term ‘équité de genre’.

defined as a social reconstruction approach based on natural justice that leads to gender equality in relation to the roles and responsibilities assigned to men and women.¹¹ The term ‘gender parity’¹² is defined as functional equality that consists of equal representation between men and women in accessing decision-making bodies at all levels and in all areas of national life, without discrimination apart from the principle of the number, it also mentions conditions, positions and placings.¹³ It is clear from the above definition that workplace gender equality mainly focuses on giving women and men access to equal opportunities so that they may enjoy the same rewards and resources regardless of gender.¹⁴ In other words, these legal provisions enshrine the principle of equality and the prohibition on discrimination on grounds of a person’s gender.

Section 2. The principle of equality and prohibition of discrimination in the workplace

Legal doctrine considers that ‘the principles of equality and non-discrimination can be regarded as the twin pillars upon which the whole edifice of the modern international law of human rights is established’.¹⁵ These principles are guaranteed by several international, regional and sub-regional instruments relating to specific areas of human rights, as well as ILO Conventions, which have been duly ratified by the DRC. The DRC has indeed ratified the *Universal Declaration of Human Rights (UDHR)*, the *Maputo*

11 Art. 3(8).

12 This term is literally translated from the French term ‘parité homme-femme’.

13 Art. 3(11).

14 Das, A ‘Building Capability through diversity & inclusion & equality’, in *Building Organizational Capabilities* (2017) at 63.

15 J Rehman *The Weaknesses in the International Protection of Minority Rights* (2000) at 104.

Protocol,¹⁶ the *UN Convention on the Rights of the Child (CRC)*,¹⁷ the *CEDAW*, the *SADC Protocol on Gender and Development*, as well as *UN Resolution 1325*.¹⁸ The DRC has also ratified *ILO Equal Remuneration Convention, 1951 (No. 100)* on 16 June 1969, as well as *ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111)* on 20 June 2001. But, the country has not yet ratified *Workers with Family Responsibilities Convention (No. 156)* and *Maternity Protection Convention (No. 183)*. Most of these instruments, including the *SADC Protocol on Gender and Development*, give women and men equal access to wage employment in all sectors of the economy. This involves equal pay for equal work and equal remuneration for jobs of equal value for women and men; the eradication of occupational segregation and all forms of employment discrimination; as well as equal employment benefits.¹⁹

Under DRC national law, several pieces of legislation in force ensure the principle of non-discrimination and equal treatment in the workplace on the basis of the constitutional provisions, which enshrine the principle of equality. Indeed, the *Constitution of 18 February 2006*, as amended and supplemented to date enshrines the principles of equality and non-discrimination.²⁰ More specifically, the *Constitution* enshrines, under Articles 12 and 14, the principles of equal rights, opportunity and sex. And, under Article 13, the *Constitution* provides for free access of women to professional activities while excluding discriminatory measures in this area. On the other hand, the principle of non-discrimination in respect of employment and occupation is expressly enshrined in the

16The DRC has ratified the *Maputo Protocol* by virtue of *Act No. 06/015 of 12 June 2006*.

17 The DRC has ratified the *CRC* by virtue of *Legislative Order No. 90/048 of 21 August 1990*.

18 See Preamble of *Act No. 15/013 of 1 August 2015* (para. 5).

19 Art. 19 of the *SADC Protocol on Gender and Development*.

20 Art. 11, 12, 13, 14, and 66.

Constitution and other laws in force. Under the provisions of Article 36, paragraph 3, the *Constitution* provides that ‘no one may be harmed in their work because of their origin, sex, opinions, beliefs or socio-economic conditions’. This constitution provision further stipulates that all Congolese have the right and the duty to contribute through their work to the national construction and prosperity. It is therefore forbidden to harm any Congolese citizen in his/ her work, particularly because of his/ her gender. In addition, based on Article 14 of the Constitution, *Act No. 15/013 of 1 August 2015 laying down detailed rules for the fulfilment of women’s rights and gender equality* sets out terms and conditions for the fulfilment of women’s rights and gender equality.²¹

Under Article 20, *Act No. 15/013 of 1 August 2015* prohibits any discrimination in employment on the basis of sex, particularly based on a worker’s marital status, family situation or with regard to women, on their pregnancy status. Prohibition of this form of discrimination shall apply to any harmful practice related, in particular, to hiring, assignments, conditions of employment, pay and other benefits, promotion and termination of the employment contract.²² The State encourages, through incentive measures, employers hiring women to remedy existing inequalities and adopting policies to better reconcile family and professional responsibilities such as flexible and variable working hours, full-time and part-time employment, other work and social security conditions.²³ Thus, the *labour Code as amended and supplemented to date* proclaims the principle of equality and non-discrimination as regards the scope of the labour

21 Art. 1.

22 Art. 21.

23 Art. 22.

laws,²⁴ the definition of a worker²⁵ and the determination of wages.²⁶ In addition, under Article 62, the *Labour code* provides that sex, marital status, family responsibilities, pregnancy, childbirth and its consequences shall not constitute a fair, just or reasonable ground for dismissal or termination of employment.

However, the *Labour Code as amended and supplemented* to date does not expressly define discrimination in the workplace, but contains provisions relating to the principle of non-discrimination.²⁷ Under the provisions of Article 128, paragraph 2, the *labour Code* considers that maternity should never be a source of discrimination in the area of employment. This provision further prohibits employers from requesting a pregnancy test or a certificate attesting or not the state of pregnancy of a prospective female employee prior to extending an offer of employment. However, the requirement of such a pregnancy test or a certificate should be limited to work that is totally or partially prohibited for pregnant women, nursing mothers or to work involving a known or significant risk to the health of the woman or child. In the same vein, *Act No. 15/013 of 1 August 2015 laying down detailed rules for the fulfilment of women's rights and gender equality* prohibits employers from discriminating against workers on grounds of gender, based in particular on marital status and family situation or regarding women, based on their pregnancy.²⁸

24 Art. 1.

25 Art. 7.

26 Art. 86.

27 Art. 1(1); Art. 7(1).

28 Art 20.

Furthermore, *Act No. 13/013 of 1 June 2013 pertaining to the status of national Police career personnel* prohibits, under Article 19, any discrimination between candidates on the grounds of their gender, etc. Similarly, *Act No. 13/005 of 15 January 2013 pertaining to the status of members of the DRC's Armed Forces* prohibits the taking of discriminatory measures within the armed forces on the basis of specific grounds, including gender.²⁹

It is worth noting that the prohibition of discrimination in the workplace shall apply to any harmful practices related in particular to hiring, assignment of duties, working conditions, remuneration and other employment benefits, promotion as well as termination of the employment contract.³⁰ In terms of social security, all workers governed by the provisions of the *labour Code* shall, without distinction of gender, be covered by the compulsory social security scheme established by *institutional legislative Decree of 29 June 1961 pertaining to social security*. However, the law requires that these employees be employed, primarily, in the DRC on behalf of one or several employers, notwithstanding the nature, form, validity of the contract, the nature and amount of wages.³¹

Section 3. Women's work regime

29 Art 11.

30 See Art 21 of *Act No. 15/013 of 1 August 2015 laying down detailed rules for the fulfillment of women's rights and gender equality*.

31 Art. 1 of *Ministerial Order No. 049/CAB/MIN/ETPS/MBL/2012 of 10 December 2012 relating to the membership of employers in workers' registration as well as the terms and conditions of payment of social security contributions*.

The Congolese legislator has enacted rules that define women's work regime. These two schemes take into account their physical constitution, sensitivity, responsiveness and reactions.³² Female employees' work regime is determined by Articles 128 to 132 of the *Labour Code* on the one hand, and by Articles 4 to 23 of *Ministerial Order No. 68/13 of 17 May 1968 determining the conditions of work of women and children*, on the other hand. It includes working time as well as types of work authorised and unauthorised for women.

The DRC has made satisfactory progress towards enacting and implementing legislation to ensure gender equality in female workforce participation. In order to address the issue relating to workplace gender equality in the DRC, this critical analysis focuses, on the one hand, on the husband's authorisation before entering into an employment contract (1), which regarded as gender-based discrimination and, on the other hand, the prohibition of women from carrying out work that exceed their strength, and work that is hazardous or unhealthy (2).

3.1 Husband's authorisation before entering into an employment contract

It is worth stressing that the DRC recognises that women have a contribution to make through their active participation in public life, through their economic, social and political activity. To this end, the State has solemnly proclaimed equality between men and women in all aspects of life, thus putting an end to gender discrimination under the

³² Lule L *Précis de droit du congolais* (2017) at 461-62 ; Mutshipangu *Droit congolais des relations de travail* (2017) at 297.

previous legal regime. In fact, the DRC national legislation contained certain provisions, which contravened the principle of non-discrimination in the workplace. For instance, the old labour legislation, i.e. *Legislative Order No. 67/310 of 9 August 1967 pertaining to the Labour Code*, had enshrined the principles of marital opposition and inability of married women to enter into employment contracts. Under Article 3 (c) of the old *Labour Code*, a married woman could validly enter into an employment contract, unless the husband expressly opposed it.

In addition, *Act No. 81/003 of 17 July 1981 governing the status of career members of the State public services* contains a specific provision, which is clearly discriminatory against married women. Pursuant to the provisions of Article 8, paragraph 8 of this Act, a married woman shall not, without prior written authorisation of her husband, be recruited as career member of the State public services to perform public service duties. This provision confirmed the legal incapacity of the married woman enshrined in Articles 448 *et seq.* of the *Family Code* of 1987. Under the provisions of Article 448 in particular, the 1987 *Family Code* required a married woman to obtain her husband's permission for all legal acts in which she incurs a personal obligation. However, these discriminatory provisions are now repealed by new provisions, which suppress entirely marital authorisation for married women.³³ Under Article 448 of *Act No. 16/008 of 15 July 2016 amending and supplementing the 1987 Family Code*, spouses must agree on all legal acts requiring them to perform a service. In addition, under *Act No. 16/013 of 15 July 2016 governing the status of career members of the State public services*, the husband's prior

³³ See *Act No. 16/008 of 15 July 2016 amending and supplementing the 1987 Family Code* (para. 4 of the Preamble).

written authorisation is no longer required for a married woman to be recruited as career member of the State public services to perform public service duties.

Unfortunately, despite this development in the right direction, the *2002 Labour Code* implicitly introduced the system of marital authorisation prior to entry into an employment contract. Such is the meaning to be given to Article 6, paragraph 1 of the *2002 Labour Code*, which provides: ‘A person’s ability to offer his or her services shall be governed by the law of his or her country, or if the nationality is unknown, by DRC law.’ In the DRC, such ability was regulated by *Act No. 87/010 of 1 August 1987 pertaining to the Family Code*, which provides, under article 448, that ‘a woman must obtain the permission of her husband on all legal deeds, which require her to provide a service that must be given in person’.³⁴ It is clear from the combination of Articles 6 of the *2002 Labour Code* and 448 of the *1987 Family Code* that Congolese women needed their husbands’ permission before entering into an employment contract. Without such permission, the employment contract was supposed to be declared void.³⁵

Now, it appears that the issue of the married woman’s ability to enter into an employment contract belongs to the past. Not only was Article 448 of the old *Family Code* unconstitutional, but it also put the DRC in conflict with numerous international commitments on human rights, in particular with the *International Covenant on Civil and Political Rights (ICCPR)*, the *African Charter on Human and Peoples’ Rights (the Banjul Charter)*, and the *CEDAW*. As mentioned above, all these international instruments

³⁴ Bonyi M *Droit du travail* (2008) at 166.

³⁵ Art. 452 of the *1987 Family Code*.

explicitly or implicitly prohibit all forms of discrimination against women, including married women. Clearly, this refers to the DRC State's obligations in connection with civil and political rights as well as economic, social and cultural rights under international human rights treaties, which must take precedence over any national provisions that would conflict with them.

In addition, Article 1 paragraph of the *Labour Code as amended and supplemented to date*, provides that all provisions thereof shall be applicable to all workers and to all employers, regardless of gender, civil status, etc. Therefore, the *Labour Code's* provisions shall automatically apply equally to men and women, and to all women, whether married or not. Moreover, a person's ability referred to under Article 6 paragraph 1 of the *Labour Code*, is seen today as regulated by the DRC specific labour law, i.e. the *labour Code*, which provides, under Article 6, paragraph 2, that a person who has attained the age of 18 years shall have legal capacity to enter into any employment contract. Therefore, whether married, divorced, widowed or single, an 18-year-old Congolese woman may freely enter into an employment contract. To this effect, no husband's authorisation or opposition is required.

Unlike a doctrine that considers that the *Family Code*, specifically Article 448, is the law applicable to married women's ability in labour-related matters, a more recent doctrine asserts that it is rather the *Labour Code* that shall be applicable as a specific law in labour-related matters in the DRC. This theory is based on the Latin maxim, '*Specialia generalibus derogant*' ('The specific derogates from the general'). This maxim means

that where there is a conflict between a general provision or rule and a specific one, the latter must prevail over the former. It is worth noting that the specific provision or rule is considered an exception to or special application of the general provision or rule.³⁶

Indeed, under the principle of specificity, where the *Labour Code* imposes, by way of a formal provision, a solution that is in conflict with that of the *Civil Code*, the latter must be ruled out.³⁷ Admittedly, in practice, it is observed that married women's freedom to enter into employment contracts is effectively exercised only with the consent, even tacit, of their husband. The stubbornness of the woman facing her husband's opposition may cause misunderstandings that can lead to family arguments or even family breakups. Therefore, some employers are wrong to insist on requiring the husband's authorisation of female jobseekers when they declare themselves to be married persons.³⁸ Moreover, it is unlawful for an employer to take pregnancy into account in refusing to employ a woman and seek to determine whether an applicant is pregnant. Similarly, women cannot be required to reveal the fact that they are pregnant, whether they apply for a job or are employed in one.³⁹

The *Labour code as amended and supplemented to date* provides, under Article 62, that sex, marital status, family responsibilities, pregnancy, childbirth and its consequences shall not constitute a fair, just or reasonable ground for dismissal or termination of employment. Under Article 57 of the *Labour code*, pregnancy or childbirth and its

36 E. Steiner *French Law: A Comparative Approach* (2nd ed.) (2018) at 59; A. X. Fellmeth, M. Horwitz *Guide to Latin in International Law* (2009) at 265.

37 Lule op cit (note 32) at 227.

38 Ibid.

39 Ibid.

consequences are considered a ground for suspension of an employment contract. The Kisangani and Matadi Courts of Appeal upheld this *Labour Code* provision respectively in cases of *Bitwisila versus Bambino School* and *Zaire Gulf Oil and PHI versus Ngandu*.⁴⁰

3.2 Prohibition of women from carrying out work that exceed their strength, and work that is hazardous or unhealthy

The *Labour Code* and some regulatory texts contain protective standards for working women that seem to be contrary to the principle of equal treatment of men and women enshrined in domestic legal instruments and international conventions duly ratified by the DRC. Indeed, under Article 128 of the *Labour Code*, some types of work are prohibited for women by way of a ministerial order, issued following an opinion issued by the National Labour Council. Thus, *ministerial No. 68/13 of 17 May 1968* prohibits any employer from employing women in work exceeding their strength, exposing them to high occupational risks.⁴¹ To this end, under Article 18 of the *Ministerial Order No. 68/13 of 17 May 1968*, women are prohibited from being assigned to regular manual transport of loads.

The prohibition imposed on women to perform work exceeding their strength, and hazardous or dangerous or unhealthy work, undeniably undermines the principle of equal

40 *Kisangani Court of Appeal, RTA 188 of 19 January 1995, Bitwisila v. Bambino School*, unpublished; *Matadi Court of Appeal, RTA 04 of 07 April 1998, Zaire Gulf Oil and PHI v. Ngandu*, unpublished, cited in Lukoo Musubao R *La jurisprudence en droit du travail et de la sécurité sociale* (2013) at 199.

41 Art. 1.

treatment between women and men. Such prohibition shall be regarded as discriminatory and in breach of Article 12 of the *Constitution* proclaiming equality of all citizens before the law. It is for this reason that many respected legal scholars call for the principle prohibiting women from performing certain jobs to be repealed as unconstitutional and non-compliant with international instruments ratified by the DRC. In fact, an equal opportunity should be given to job seekers because any exclusion made on the basis of sex nullifies or impairs equality of opportunity or treatment in employment or occupation.⁴²

Under DRC law, women are only eligible for light, safe and non-hazardous jobs that may be carried out during the day or at night. It is worth noting that *Act No. 16/010 of 15 July 2016 amending and supplementing the 2002 labour Code* brings important innovations in terms of women's access to professional activities. Such innovations include the possibility for women to perform night work, as well as the possibility for pregnant women to suspend their employment contract without this being considered as a cause for termination.⁴³ Unlike the old Article 125, the new amended provision of Article 125 of the labour Code allows women to perform night work in public or private industrial units. Thus, the provision of Article 13 of *Ministerial Order No. 68/13 of 17 May 1968 determining the conditions of work of women and children*, which prohibits women, regardless of age, from performing night work in industrial production units shall become null and void. If men are allowed to work at night⁴⁴ for an extra pay, the same goes for women, as they are no longer prohibited from being employed during the night in any

42 Masanga P. Mvioki *J Droit congolais du travail* (2015) at 140 ; Mutshipangu op cit (note 32) at 298.

43 See Explanatory Statement and Articles 125 and 129.

44 Art. 105 of the Labour Code.

industrial undertaking.⁴⁵ *ILO Night Work (Women) Convention (Revised), 1948 (No. 89)*, as duly ratified by the DRC since 20 September 1960 and which prohibits night work for women, should therefore be amended. The concept of night itself is defined differently by the current DRC labour law depending on whether it applies to men or women. For men, night refers to the period of time between 7 p.m. and 5 a.m.⁴⁶ and for women it is defined as the period of time between 6 p.m. and 6 a.m.⁴⁷

While the actual working hours of female employees are the same as those of their male counterparts, it shall, however, be accompanied with one or more interruptions of at least one hour of rest if it exceeds 4 hours of actual work per day.⁴⁸ This rule is not applicable in many companies.⁴⁹ In addition, for female employees, working in excess of statutory working time is limited to one hour per day, resulting in their working hours not exceeding 9 hours per day.⁵⁰

Women employed in domestic work may, however, work 54 hours a week. This shall be regarded as time of attendance amounting to statutory working time and paid on the basis of 8 hours of actual work per day. Such is the reason why this time is referred to as the working-time equivalency.⁵¹ This regime is open to criticism in the sense that it discriminates against women employed in domestic work. It is unfair and must be abolished. Besides, it is wrong for women employed in domestic work to be regarded as

45 Mutshipangu op cit (note 32) at 299.

46 Art. 124 of the Labour Code.

47 Article 125 of the Labour Code.

48 Art. 4 of *Ministerial Order No. 68/13 of 17 May 1968*.

49 Mutshipangu op cit (note 32) at 297.

50 Art. 5, 7 and 8 of *Ministerial Order No. 68/13 of 17 May 1968*.

51 Article 6 of *Ministerial Order No. 68/13 of 17 May 1968*.

contract workers.⁵² On the other hand, a woman who nurses her child shall be entitled, in all cases, to two special rest periods a day, of half an hour each, to enable her to nurse her child. These rest periods shall be paid as working time.⁵³

Lastly, the *labour Code* gives any pregnant woman with her condition medically confirmed, the right to terminate her employment contract, without prior notice and, by virtue of her condition, will not be required to pay any compensation for contract termination.⁵⁴

Section 4. Sexual harassment in the workplace

It is acknowledged that gender inequality is evident in sexual harassment and bullying, all-too-common experiences in many workplaces.⁵⁵ Sexual harassment at work is, indeed, another serious problem and important legal issue particularly affecting working women in the DRC. The Ministry of Labour acknowledges, in its explanatory note, that sexual harassment is one of the evils that have taken up residence in the work environment in the DRC.⁵⁶ According to a study conducted by the Ministry of Health with fifteen public and private companies in the city of Kinshasa from 13 to 17 September 2010, 64 per cent of women have experienced sexual harassment in the workplace.⁵⁷

52 Mutshipangu op cit (note 32) at 297.

53 Art. 132 of the Labour Code.

54 Art. 129.

55 Welsh 1999, cited in C. Williams, K. Dellinger (eds) *Gender and sexuality in the workplace* (2010) at 1.

56 Bonyi op cit (note 34) at 462.

57 Radio Okapi 'Kinshasa: 64 % de femmes connaissent un harcèlement sexuel au travail, selon une étude du ministère de la Santé' (08 August 2015) *Radio Okapi*: Kinshasa. Available at: <https://www.radiookapi.net/actualite/2012/04/27/kinshasa-64-3-de-femmes-connaissent-harcelement-sexuel-au-travail-selon-une-etude-du-ministere-de-la-sante> [accessed 21 April 2018].

It is argued that sexual harassment is regarded as a form of sex discrimination prohibited under existing laws.⁵⁸ The *2002 Labour Code* provides, under Article 73, that any act of sexual harassment committed by the employer or his/ her agent towards an employee in the workplace shall be regarded as gross misconduct justifying termination of the employment contract by the employee. Under these circumstances, the employer shall be ordered to pay out damages to the employee.⁵⁹ Similarly, under Article 74 of the *2002 Labour Code*, any act of sexual harassment committed by the employee towards the employer or his/ her staff shall be regarded as gross misconduct justifying termination of the employment contract by the employer. In this case, the employer may claim compensation from the worker for the harm directly caused by the worker's gross misconduct.⁶⁰ *Ministerial Order No. 12/CAB.MIN/TPS/114/2005 of 26 October 2005* prohibits any act constituting sexual or moral harassment in labour relations, particularly in terms of learning, hiring, compensation, training, assignment, transfer, termination or renewal of the contract.⁶¹

Under Article 4, *Ministerial Order No. 12/CAB.MIN/TPS/114/2005* gives anyone that is the victim of sexual or moral harassment the right to terminate their contract for gross misconduct at expense of the other party. Despite the fact that the relevant case law does not specifically refer to sexual harassment in the workplace, it has, nevertheless, been

58 Ehrlich Martin S, C. Jurik N 'Changes in criminal justice, occupations and women in the workplace', in *Doing Justice, Doing Gender: Women in Legal and Criminal Justice Occupations (Women in the Criminal Justice System)* at 9.

59 Art. 75, al. 1 of the 2002 Labour Code.

60 Art. 75, al. 2 of the 2002 Labour Code.

61 Art. 2.

held that acts of wickedness or lack of integrity must be regarded as gross misconduct and may, as such, legitimise termination of the contract that binds the parties.⁶² Moreover, it has been held that gross misconduct is a single act of misconduct, which, after it has been committed by one of the parties, may provoke unsustainable and harmful psychological situation between parties rendering the continuation of contractual and / or professional relations morally impossible.⁶³

The DRC labour law considers gross misconduct as any fact or fault that immediately and definitively renders the continuation of the labour relationship impossible. It involves such a deterioration or termination of the relationship between the parties that maintenance of the employment or contractual relationship is rendered impossible even for the duration of the notice.⁶⁴

Under Article 5, *Ministerial Order No. 12/CAB.MIN/TPS/114/2005* provides that company regulations or collective agreements may provide for disciplinary sanctions commensurate with the seriousness of the offense. *Act No. 06/018 of 20 July 2006 amending and supplementing the Decree of 30 January 1940 pertaining to the Congolese Penal Code* punishes sexual harassment by a prison term of one to twelve years and a fine ranging between fifty thousand and one hundred thousand Congolese francs or one

⁶² *Kinshasa / Gombe Court of Appeal, RTA 3.403 of 10 October 1996, W. vs Marsavco, 1966 VI*, at 282, in Lukoo op cit (note 40) at 181.

⁶³ *Kinshasa / Gombe Court of Appeal, CAR 5022 of 13 May 2005, MB. vs Cohydro, unpublished*, in Lukoo op cit (note 40) at 175.

⁶⁴ *Likasi High Court, RT 013 of 2 July 2002, K. vs. Majestic Hotel, unpublished, Kin, 29 March 1972, RJZ 1972*, at 155; *Butembo High Court R.T. 06 of 8 Nov. 2000, K. vs. Minoki, unpublished*, in Lukoo op cit (note 40) at 171).

of these penalties only.⁶⁵ Under the provisions of Article 181, paragraph 1, *Child Protection Act of 10 January 2009* punishes child sexual harassment by a principal prison term of three to twelve years and a fine of two hundred thousand to four hundred thousand Congolese francs.

It has been held that an employer who alleges the worker's gross misconduct in order to terminate the employment contract must provide proof thereof. Failing this, such termination of the contract would be unfair.⁶⁶ It goes without saying that sexual or moral harassment or bullying will be proved by any legal means. However, if bullying can be easily proven, in particular, by comments from the employer and other doings and actions, possibly in front of witnesses, the same would not apply for sexual or moral harassment. In some jurisdictions, proceedings involving sexual harassment are always held in camera. This might present a real challenge given that sexual harassment rarely presents clear physical evidence and the only proof could be the word of the alleged victim against the word of the alleged perpetrator. The law provide no clear indication of the ways and means of proving cases of sexual or moral harassment.⁶⁷

Section 5. Institutional mechanisms aimed at achieving gender equality

Having regard to the recommendations made by the ILO to member States to include in their policies and programmes the issue of equal opportunities, gender equality, as well as

65 Art. 174d.

66 Kinshasa/ Matete Court of Appeal RTA 2597 of 13 May 1993, *Tulankwe vs. Sodimca* ; RTA 1794/407 of 12 November 1992, *Totoc/ Mizele et al.* ; RTA 1794/2407 of 11 September 1992, *Kabamba vs. Bralima* ; RTA 1979 of 17 January 1999, *Kanza vs. INPP*, unpublished, in Lukoo op cit (note 40) at 172.

67 Bonyi op cit (note 34) at 462-63.

the opinion issued by the National Labour Council on the need to put in place a national programme for workplace gender equality, the DRC law provides for a committee and the National Programme for workplace gender equality.⁶⁸ On the one hand, the committee responsible for the formulation of the national programme for gender equality in the workplace, hereinafter referred to as the ‘PNEG Committee’, is set up within the Ministry of Employment, Labour and Social Welfare.⁶⁹ The PNEG Committee is made up of members from specific departments, including those in charge of labour, education, gender, family and children, youth and sports, etc. as well as members from and agencies, including National Institute of Professional Preparation, National Employment Office, etc. with two representatives each.⁷⁰ Members of the PNEG Committee and the Technical Secretariat are entitled to bonuses and benefits determined by the minister of labour at the expense of the public treasury.⁷¹ The duration of the work of the PNEG Committee is twelve months from the date of the set-up thereof.⁷²

On the other hand, the National Programme for gender equality in the workplace, abbreviated as ‘GET’, has as its primary mission the fight against discrimination in the workplace, through monitoring, assessment of the implementation of legal instruments

68 Explanatory Statement of Ministerial Order No. Interministerial Order No. 11/CAB/MIN/ETPS/MBL/ABA/dag/2012 and 018/CAB/MIN/BUDGET/2012 of 22 December 2012 updating Interministerial Order No. 091/CAB/ETPS/BGS/NAJ/pkg/2011 and CAB/MIN/BUDG/JBNK/NAJ/pkg/2011 of 28 December 2011 determining the scale of specific and permanent bonuses for executives and employees of the national programme for gender equality in the workplace, abbreviated as ‘GET’.

69 Art. 1 of Ministerial Order No. 12-CAB.MIN-ETPS-060-2008 of 18 September 2008 governing the creation, organisation and functioning of the commission responsible for the formulation of the national programme for gender equality in the workplace.

70 Art. 3.

71 Art. 7.

72 Art. 8.

and compliance with different conventions ratified by the DRC relating to specific gender rights.⁷³

‘As such, the GET is responsible for:

- carrying out quantitative and / or qualitative prospective studies on the jobs and skills both at local and national levels in the workplace;
- providing information in the definition, development and implementation of the national policy of employment and vocational training in connection with the integration of the gender dimension in the workplace;
- serving as permanent observer in the concrete implementation of the laws relating to equality, equity, parity and gender in state services and in public and private companies, with a view to defending ill-fated injustices linked to the non-compliance with standards on equal hiring opportunities, promotion and benefits;
- training gender assessors and auditors throughout the DRC;
- preparing proposals and the implementation of actions aimed at reducing inequalities between women and men in the workplace in the DRC’.⁷⁴

Conclusion

In the DRC, despite progressive labour legislation and policy prohibiting gender discrimination in the workplace, as described in this paper, the gap is still prevalent in the

73 Art. 2, para. 1 of the Ministerial Order No. 044/CAB/MIN/ETPS/MBL/SGET/dag/2012 of 26 November 2012 amending Ministerial Order No. 12/CAB.MIN/ETPS/060/2008 of 18 September 2008 governing the creation, organisation and functioning of the commission responsible for the formulation of the national programme for gender equality in the workplace.

74 Ibid. (Art. 2, para. 2).

workforce. Many women continue to face discrimination in all employment practices and terms and conditions of employment, including hiring, wages, promotion, training opportunities, benefits as well as job conditions. In addition, women continue to experience sexual harassment at the workplace, whether in physical, verbal or non-verbal way or other ways based on sex affecting their dignity. This reflects gender inequalities, which is mainly due to women's subordinate status in such a male-dominated society and has a negative impact on women's participation in the labour market.

References

A. Books, articles, and reports

Bonyi M *Droit du travail* (2008) CRDS: Bruxelles.

Das, A 'Building Capability through diversity & inclusion & equality', in *Building Organizational Capabilities: An Insightful Examination of the principles and Practices of Making Great Organization* (2017) Educreation Publishing: New Delhi, at 49-83.

Ehrlich Martin S, C. Jurik N 'Changes in criminal justice, occupations and women in the workplace', in *Doing Justice, Doing Gender: Women in Legal and Criminal Justice Occupations (Women in the Criminal Justice System)* 2nd Edition (2007) SAGE Publications, Inc: London.

Fellmeth A. X., M. Horwitz *Guide to Latin in International Law* (2009) Oxford University Press: Oxford.

Lukoo Musubao R, *la jurisprudence en droit du travail et de la sécurité sociale - tome 1 (2e ed)* (2013) Edition On s'en sortira : Kinshasa.

- Lule L *Précis de droit du congolais* (2nd ed.) (2017) éditions LULE: Kinshasa.
- Masanga Phoba Mvioki J *Droit congolais du travail* (2015) L'Harmattan: Paris.
- Mutshipangu T *Droit congolais des relations de travail* (2017) Editions Connaissance du droit : Kinshasa.
- Rehman J *The Weaknesses in the International Protection of Minority Rights* (2000) Kluwer Law International: The Hague, London, Boston.
- Steiner E. *French Law: A Comparative Approach* (2nd ed.) (2018) Oxford University Press: Oxford.
- Voola AP *et al.* 'A "Fair Go" in the Lucky Country? Gender Equality and the Australian Case' in A Ortenblad *et al.* (eds.) *Gender Equality in a Global Perspective* (2017) Routledge: New York and London.
- Williams C., Dellinger K. (eds.) *Gender and Sexuality in the Workplace* (2010) Emerald: Bingley.

B. News article

- Radio Okapi 'Kinshasa : 64 % de femmes connaissent un harcèlement sexuel au travail, selon une étude du ministère de la Santé' (08 August 2015) *Radio Okapi* : Kinshasa. Available at: <https://www.radiookapi.net/actualite/2012/04/27/kinshasa-64-3-de-femmes-connaissent-harcelement-sexuel-au-travail-selon-une-etude-du-ministere-de-la-sante> [accessed 21 April 2018].

C. Legislation

Act No. 81/003 of 17 July 1981 governing the status of career members of the State public services.

Act No. 87/010 of 1 August 1987 pertaining to the Family Code.

Act No. 06/015 of 12 June 2006 authorising the accession of the Democratic Republic of Congo to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa [The Maputo Protocol].

Act No. 06/018 of 20 July 2006 amending and supplementing the Decree of 30 January 1940 pertaining to the Congolese Penal Code.

Act No. 09/001 of 10 January 2009 pertaining to child protection (Child Protection Act).

Act No. 13/005 of 15 January 2013 pertaining to the status of members of the DRC's Armed Forces.

Act No. 15/013 of 1 August 2015 laying down detailed rules for the fulfilment of women's rights and gender equality.

Act No. 16/010 of 15 July 2016 amending and supplementing Act No. 015/2002 of 16 October 2002 pertaining to the labour Code.

Act No. 16/008 of 15 July 2016 amending and supplementing Act No. 87/010 of 1 August 1987 pertaining to the Family Code.

Act No. 16/013 of 15 July 2016 governing the status of career members of the State public services.

Constitution of the DRC (as amended by Act No. 11/002 of 20 January 2011 amending some Articles of the Constitution of the DRC of 2006 February 18).

Institutional legislative Decree of 29 June 1961 pertaining to social security.

Legislative Order No. 90/048 of 21 August 1990 authorising ratification of the Convention on the Rights of the Child.

Ministerial Order No. 68/13 of 17 May 1968 determining the conditions of work of women and children (Moniteur Congolais, 1968).

Ministerial Order No. 12/CAB.MIN/TPS/114/2005 prohibiting sexual or moral harassment in the performance of the employment contract.

Ministerial Order No. 049/CAB/MIN/ETPS/MBL/2012 of 10 December 2012 relating to the membership of employers in workers' registration as well as the terms and conditions of payment of social security contributions.

Ministerial Order No. 11/CAB/MIN/ETPS/MBL/ABA/dag/2012 of 22 December 2012 updating Interministerial Order No. 091/CAB/ETPS/BGS/NAJ/pkg/2011 and CAB/MIN/BUDG/JBNK/NAJ/pkg/2011 of 28 December 2011 determining the scale of specific and permanent bonuses for executives and employees of the national programme for gender equality in the workplace, abbreviated as 'GET'.

Ministerial Order No. 12-CAB.MIN-ETPS-060-2008 of 18 September 2008 governing the creation, organisation and functioning of the commission responsible for the formulation of the national programme for gender equality in the workplace.

Ministerial Order No. 044/CAB/MIN/ETPS/MBL/SGET/dag/2012 of 26 November 2012 amending Ministerial Order No. 12/CAB.MIN/ETPS/060/2008 of 18 September 2008 governing the creation, organisation and functioning of the commission

responsible for the formulation of the national programme for gender equality in the workplace.

D. Case law

Butembo High Court R.T. 06 of 8 Nov. 2000, K. vs. Minoki, unpublished.

Kinshasa / Gombe Court of Appeal, RTA 3.403 of 10 October 1996, W. vs Marsavco, 1966 VI, at 282, in Lukoo op cit (note 40) at 181.

Kinshasa / Gombe Court of Appeal, CAR 5022 of 13 May 2005, MB. vs Cohydro, unpublished.

Kinshasa/ Matete Court of Appeal RTA 2597 of 13 May 1993, Tulankwe vs. Sodimca ; RTA 1794/407 of 12 November 1992, Totoc/ Mizele et al. ; RTA 1794/2407 of 11 September 1992, Kabamba vs. Bralima ; RTA 1979 of 17 January 1999, Kanza vs. INPP, unpublished.

Kisangani Court of Appeal, RTA 188 of 19 January 1995, Bitwisila v. Bambino School, unpublished.

Likasi High Court, RT 013 of 2 July 2002, K. vs. Majestic Hotel, unpublished, Kin, 29 March 1972, RJZ 1972.

Matadi Court of Appeal, RTA 04 of 07 April 1998, Zaire Gulf Oil and PHI v. Ngandu, unpublished.

E. International Treaties and Conventions

African [Banjul] Charter of Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) entered into force Oct. 21, 1986 (ratified on 20 July 1987, by virtue of Legislative Decree No. 87/027 of 20 July 1987, and published in the special edition of the Official Gazette of September 1987).

African Charter on the Rights and Welfare of the Child, adopted July 1990, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999 (ratified by virtue of Legislative Decree No. 007/01 of 28 March 2001).

Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.

Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990.

Declaration on Gender Equality in Africa (SDGEA), adopted by Heads of State and Government of Member States of the African Union, meeting in the Third Ordinary Session of our Assembly in Addis Ababa, Ethiopia, from 6-8 July 2004.

Declaration on the Elimination of Discrimination against Women, GA Res 2263 (XXII) UN GAOR 22nd sess, UN Doc A/RES/2263 (7 November 1967).

Discrimination (Employment and Occupation) Convention (ILO No. 111), 362 U.N.T.S. 31, entered into force June 15, 1960.

Equal Remuneration Convention, 1951 (No. 100) (entered into force: 23 May 1953), adoption: Geneva, 34th ILC session (29 Jun 1951) - Status: Up-to-date instrument (Fundamental Convention).

ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the ILC at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010).

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, Can. T.S. 1976 No. 47 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976 (accessed on 1 November 1976).

International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); Can. T.S. 1976 No. 46 (entered into force 3 January 1976, accession by Canada 19 May 1976).

Maternity Protection Convention, 2000 (No. 183) [Convention concerning the revision of the Maternity Protection Convention (Revised), 1952 (Entry into force: 07 Feb 2002); adoption: Geneva, 88th ILC session (15 Jun 2000)].

Night Work (Women) Convention (Revised), 1934 (No. 41)[Convention concerning Employment of Women during the Night (Revised), 1934 (Entry into force: 22 Nov 1936); adoption: Geneva, 18th ILC session (19 Jun 1934)].

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa [The Maputo Protocol], Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts. L.J. 40, entered into force 25 November 2005.

SADC Protocol on Gender and Development adopted by SADC Heads of State on 17 August 2008 in Sandton, Gauteng.

United Nations Security Council Resolution 1325 (S/RES/1325), on women, peace, and security, adopted unanimously by the UN Security Council on 31 October 2000, after recalling resolutions 1261 (1999), 1265 (1999), 1296 (2000), and 1314 (2000).

Universal Declaration of Human Rights, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948); adopted by the U.N. General Assembly on December 10, 1948.

Workers with Family Responsibilities Convention, 1981 (No. 156) [Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities] (Entry into force: 11 Aug 1983); adoption: Geneva, 67th ILC session (23 Jun 1981).