

Research Article

LGBTI LEGAL RIGHTS IN VIETNAM: RECENT DEVELOPMENT AND PERSPECTIVE

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ABSTRACT

Lesbians, Gays, Bisexuals, Trans, Intersexes (LGBTI)'s rights are one of the new and controversial issues of human rights law. It includes a wide range of rights, including some specialized for LGBTI group. Law is the most important tool to protect and secure the rights of LGBTI group, but there are many factors affecting the development and implementation of regulations on LGBTI rights in a country, such as politics, culture, science and technology, etc. Vietnam is emerging as one of the most progressive Asian countries in term of LGBTI's rights recognition. This paper analyzes recent developments in Vietnamese law on the rights of LGBTI group. According to the author, although there has been some progress recently, LGBTI's legal rights have not fully met the needs of local LGBTI group in Vietnam. In addition, there are challenges facing LGBTI group in enjoying their rights, due to social prejudice and law enforcement. Accordingly, in order to ensure full legal rights of LGBTI group, Vietnam needs to continue revising and amending relevant legislative documents, as well as to have solutions to promote LGBTI's enjoyment of their rights in practice.

Keywords: Legal rights, LGBTI, Sexual orientation, Gender identity, Vietnam.

INTRODUCTION

In Vietnam, homosexuals, bisexuals, transgender and intersexes (LGBTI) have been presenting more clearly in social life. For homosexuals, bisexuals and transgender (LGBT), in 2013, a survey¹ shows that there is an existence of a Vietnamese homosexual community and this community is quite attached to the social community, with 30.4% surveyed are acquainted with homosexuals. This survey also shows that 27.4% surveyed are aware of the phenomenon that "two people of the same sex living together as husband and wife" directly from homosexuals, proving that this is a social phenomenon that needs proper attention and solutions regarding its legal aspects. It can be noticed that more and more people are aware of homosexuality and the phenomenon of two people of the same sex living together as husband and wife, and especially a large number of people already know someone homosexual (relatives, friends, colleagues, neighbors, etc.). Using the average, "safe" ratio of 3%² that many scientists agree on, the estimated number of homosexuals in Vietnam is about 2.89 million people (based on the Vietnamese population of 96.2 million people³ as of 2019). Similar to homosexual (and bisexual) people, even though transgender people have existed in Vietnamese society, it is difficult to know the exact number, especially when the concept of transgender is not limited to only those that have had surgery but also includes those who have a clear perception of the difference between their true gender and biological sex and have a tendency/desire to be transgendered, although in reality that may not and never happen.⁴ Researches around the world show that the percentage of

transgender people ranges from 0.1% to 0.5% of the population.⁵ According to a research report completed in August 2019⁶ with 5999 participants, the majority of the respondents currently live in Ho Chi Minh City (2248 people, 37.5%) and Hanoi City (978 people, 16.3%). The result of a sexual orientation analysis shows that more than half surveyed (55.4%) identified their sexual orientation as homosexual (gay, lesbian or other equivalent terms), 25.6% surveyed responded that their sexual orientation is bisexual. In terms of gender identity, the majority (81.4%) said that they were cisgender (where gender identity matches biological sex, cisgender male accounts for 17.6% and cisgender female accounts for 63.8%) while 18.1% were transgender (2.5% male-to-female transgender and 15.6% female-to-male transgender). A minority of respondents claimed to be non-binary or did not identify their gender to any group (0.5%). For intersex people, an assessment of their overall state in Vietnam is relatively lack of information comparing to LGBT. As there are many intersex states and there is no uniform definition of intersex, it is difficult to provide statistics on the number of intersex people at this time. According to estimates by scientists around the world, intersex people account for about 1-2% of the world population,⁷ equivalent to about 1 intersex person out of every 2000 people. Meanwhile, according to another statistic by researcher Sharon E. Preves, the frequency of occurrence (of inter-sex status) may be approximately 4%.⁸ This is completely natural and intersex people are not uncommon, we just do not know or they have "hidden in society". Data collection has found that on average, the Children's Hospital 2 (Ho Chi Minh City, Vietnam) receives 250 to 400 cases, most are cases that male malformations in the genitals are easily mistaken as female's and the majority of the cases is due to the low urinary hole. There is a small number of cases where females are thought to be males due to congenital adrenal hyperplasia, which made the clitoris

¹Institute of Sociology, Health Strategy and Policy Institute, Institute for Studies of Society, Economy and Environment (iSEE) (2013). *Research report on the result of the referendum on same-sex marriage*. Hanoi, Vietnam: The Gioi Publishers, 7-8.

²Jennifer Robison (2002). What Percentage of the Population Is Gay?. <http://news.gallup.com/poll/6961/what-percentage-population-gay.aspx>. Accessed 30 August 2021.

³General Statistic Office of Vietnam (2020). *Results of the Survey on population and housing census in 2019*. Hanoi, Vietnam: Thong Ke Publishers, 9.

⁴iSEE (2012). *The desire to be oneself: Transgender people in Vietnam - practical and legal issues*. Hanoi, Vietnam: The Gioi Publishers, 14.

⁵Id 22.

⁶iSEE (2019). *Same-Sex Partnership Report: The love and cohabitation of homosexual, bisexual and transgender people in Vietnam*. Hanoi, Vietnam, 9-11.

⁷Hida (2015). How Common is Intersex? An Explanation of the Stats. <https://www.intersexequality.com/how-common-is-intersex-in-humans/> Accessed 30 August 2021.

⁸Sharon E. Preves (2003). *Intersex and Identity: The Contested Self*. Rutgers University Press.

grow large and look like a penis.⁹ According to many doctors, there is a high demand to determine a child's gender. Intersex people's concern mainly focus on the age at which medical interventions are used to determine gender. Therefore, intersex is also a subject that requires attentions beside LGBT. In general, the prejudices and stigma toward LGBTI in Vietnam are quite obvious.¹⁰ According to a study conducted in 2013 with the participation of 2483 LGBT people¹¹, 63% of them said they had been discriminated by one of the following forms: cursed, beat by family and outsiders; sneered; etc. Whether accepted or not, LGBTI is a worldwide phenomenon, including in Vietnam. It can be seen that Vietnamese scientific research community has become increasingly interested in researching LGBTI people in different aspects (sociology, psychology, law, human rights, etc.). This research focuses on the analysis and evaluation of a number of issues on LGBTI legal rights of Vietnam over the past and seeks solutions to achieve the goal that Vietnamese law will be more and fully responsive to the needs of LGBTI people's rights.

LITERATURE REVIEW

Some general issues

The law is the most important tool to protect and ensure the rights of LGBTI groups, but there are many factors affecting the development and enforcement of laws on their rights, such as politics, culture, science and technology, etc. From a legal perspective, the development and enforcement of laws on LGBTI rights must resolve conflicts among different groups. Therefore, this study should be based on several theories about sexual orientation, gender identity and natural rights. Just like other subjects in the society, the rights of the LGBTI are fundamentally the inherent needs, abilities, natural privileges. Nevertheless, it will only have meaning when it is recognized by the society through the process of education, struggling and development. To truly reach the so-called "right", there needs to be the second elements, which is the legal status (law). Without law, there would not truly be rights. If not being recognized in term of regulation, the human right would only exist as an uncertain matter, which could be "eroded". This could cause difficulties to the Vietnamese Government when executing the function of ensuring and protecting the human rights.¹² Having the essence as a natural right, the rights of the LGBTI also follow this principle. The rights of the LGBTI have to be recognized and protected by the law so as for the abilities, tendency, and needs to become real, which helps protecting the rights of the LGBTI in reality. That the law records the rights of the LGBTI is a vital need in the situation where the society is developing. Under the effect of stigma and discrimination, the LGBTI could be considered as a vulnerable people in the society. When participating in economic relations such as finding a job, job promotion, accommodation problems and so forth, they would face lots of struggles and might unfairly be treated.¹³ Moreover, as the LGBTI only accounts for a small percentage in the population, their voice has not been properly taken. Consequently, their capability of self-

defense, and self-protection, when their legitimate rights are violated, is usually very low. In other words, there needs to be law to protect the LGBTI from the above-mentioned abuse. Politically, when enacting the law, the legal position, rights and benefits of all parties must be considered in order to have appropriate rules¹⁴. Reality shows that with small population, having not much presence in legal conventions, the LGBTI people have not fully presented their viewpoints, desires for the lawmakers to consider and develop into the law. This does not mean only when the LGBTI speaks up that the law starts engaging, but we have to understand that the right for a person's legitimate benefits to be protected by the law is an appropriate need of every citizen. The law, when it is enacted, must take into consideration the common interest of the whole society, in which the right of minority, vulnerable groups must be taken into account. If the law did not refer to the benefits of the vulnerable minorities then it could not be a democratic and progressive legal background. The LGBTI is not a temporary social phenomenon. The existence of this phenomenon is inevitable, in every society, in every historical period. The development of life has enhanced the need toward the rights on freedom and living of human. In that context, conflicts arise between the LGBTI and the society, the traditional values, ancient cultural and ethical standards regarding their need on the recognition of the society for their existence, to be fairly treated, to be able to get married as other people. The increasing conflict of these interests requires a reasonable adjustment of law. There needs to be regulation to reconcile and solve the above-mentioned conflicts in order to keep a proper social order while thoroughly protect the basic rights of which the LGBTI deserves to have.

Some recent developments of Vietnamese regulation on LGBTI rights

It could be seen that coming with the development of the society, Vietnam had innovation in the legislative thinking towards the rights of LGBTI people. This is truly an effort of Vietnam in the field of protecting human rights.

Firstly, in term of law, Vietnam has met lots of needs on rights of the LGBTI.

According to the law of Vietnam, the LGBTI people basically have the same right as other subjects in the society. The rights of the LGBTI could be divided into two groups: (1) the common rights (applied commonly to both LGBTI people and all other subjects in the society) and (2) the specific rights (applied to transgenders and intersexes). The terminologies - sexual orientation, gender identity, homosexuals, bisexuals, transgenders, intersexes - rarely show up in any specific laws and regulations. However, the problems relating to the right of the LGBTI are represented by the law of Vietnam via a variety of legislative techniques (e.g.: marriage between people of the same gender, regulation on giving birth with assisted reproductive technology, surrogacy, gender redetermination and so forth). It could be seen that the Vietnamese LGBTI do not have to suffer from strict regulations, discrimination as in several other countries. For example: the law of Vietnam does not have regulation to forbid the homosexual/bisexual phenomenon, or imprisoning/death penalty with homosexuals/homosexual relationship and so forth.

Secondly, the constitutional basis and legal basis regarding the equality and no discrimination for the LGBTI are basically completed.

Equality is the human's basic needs and benefits (mentally and physically), which exist in each individual.¹⁵ The constitution and law

⁹Tung Thanh, Chau Lien (2013). Hàng loạt trẻ em phải xác định lại giới tính (Numerous children to have their genders redetermined). <http://thanhnien.vn/suc-khoe/hang-loat-tre-em-phai-xac-dinh-lai-gioi-tinh-462653.html> Accessed 10 August 2021.

¹⁰iSEE, The Huy Luong and Quynh Phuong Pham (2016). "Is it because I am LGBT?" - Discrimination based on sexual orientation and gender identity in Vietnam. Hanoi, Vietnam: Hong Duc Publishers, 95.

¹¹Thi Thu Nam Nguyen, Thanh Long Vu and Thanh Tra Pham (2013). *Same-sex living together: Empirical experiences and the pursuit of couple happiness*. Hanoi, Vietnam: The Gioi Publishers.

¹²Khanh Vinh Vo and others (2015). *Human rights: Postgraduate curriculum*. Hanoi, Vietnam: Social Science Publishers, 27.

¹³Hong Quang Truong (2012). Rationale for rights of homosexuals. *The Journal of Legislative Studies*, 24(232), 22-28, 36.

¹⁴ Id.

¹⁵ Khanh Vinh Vo and others, *supra*, note 12, 18.

of Vietnam do not have specific regulation on the right of equality, of non-discrimination based on the problems of sexual orientation and gender identity. Regulation on this right usually regulates generally to all subjects in the society. The constitution of the Socialist Republic of Vietnam released in 2013 (henceforth the 2013 Constitution) regulated that all people are equal before law, no one is subject to discriminatory treatment in the political, civil, economic, cultural or social life (Article 16). Therefore, according to the 2013 Constitution, the right to be equal before the law, non-discriminated could be applied to all citizens (including the LGBTI people). In particular field, the law also regulated this equality and non-discrimination right. For example: the 2015 Civil Code of Vietnam acknowledged the rule: "All individuals, legal entities are equal, there is no reason for discrimination; all are protected the same by the law regarding their personal and property rights" (Clause 1, Article 3). Looking from the viewpoint of LGBTI people, this rule is protecting their benefits. Furthermore, some other rights acknowledged in the 2015 Civil Code of Vietnam also have the meaning of protecting the benefits for the LGBTI people, such as: Right to life, right to safety of life, health and body (Article 33), Right to protection of honor, dignity and prestige (Article 34), Right to private life, personal secrets and family secrets (Article 38), Right to redetermine gender (Article 36)... These regulations contain fully all legal basis so as to protect the benefits of the LGBTI people and the 2015 Civil Code of Vietnam also did not have any regulation limiting, or forbidding the LGBTI people. The law on the penalty for administrative violations has also abolished the handling of administrative violations for acts of organizing weddings and living together between people of the same gender.¹⁶ Besides, the law of Vietnam also has some regulations on penalty for administrative violations in order to protect the LGBTI people when being discriminated. For example, the Clause 4, Article 4 of the Decree No. 88/2008/NĐ-CP dated 5 August 2008 of the Government on gender redetermination (amended and supplemented by the Decree No. 155/2018/NĐ-CP dated 12 November 2018 of the Government, which amended and supplemented some regulations related to the conditions of business investment under the state management scope of the Ministry of Health) strictly forbids the discriminatory behavior towards people who had their gender redetermined. Following that, the Clause 1, Article 45 of the Decree No. 117/2020/NĐ-CP dated 28 September 2020 of the Government regulating the penalty for administrative violations in the field of health regulated monetary fine with either of the following behaviors: disclosing information about the gender redetermination of other person, discriminating against persons who had their gender redetermined. Generally, the law about the right of equality, of non-discrimination in current political, civil, economic, cultural and social life of Vietnam is applied generally to all subjects in the society. There are some regulations directly mentioning the right of equality, of non-discrimination of the LGBTI people (regulation on penalty for administrative violations and so forth). However, the attributes of sexual orientation, gender identity are not mentioned directly in the legal field of this right.

Thirdly, legal form for a same-sex relationship is considered in the process of completing the Law on Marriage and Family in Vietnam.

Different from some other countries, the law of Vietnam only acknowledges one completed form of marriage for a relationship of a couple living together. Accordingly, the current law only acknowledges the right to get married between two people of the opposite sex. This subject is represented in the Clause 1,5 Article 3

and the Clause 2 Article 8 of the 2014 Law on Marriage and Family of Vietnam¹⁷. Accordingly, in Vietnam nowadays, marriage is that a man and a woman establish a relationship as husband and wife (heterosexual marriage) and the Vietnamese Government does not recognize a marriage between people of the same gender. However, the problems related to the relationship between people of the same gender have been considered in the process of drafting the 2013 Constitution and the 2014 Law on Marriage and Family of Vietnam. Many opinions commenting the draft proposed that it should recognize the right for same-sex marriage in the drafting amendment of the Constitution (in conferences and meetings of the National Assembly)¹⁸. The drafting committee of the amendment of the Law on Marriage and Family also included the matter of same-sex marriage in the list of matter to have comments on when formulating the draft proposal (in 2012)¹⁹ and considered legislating related regulations until the time it would be presented to the National Assembly. This consideration of the drafting committee and related agencies on the relationship of a LGBTI couple living together shows that this is a practical and legitimate need. Recently, the Preliminary Report of 3 years of implementing the 2014 Law on Marriage and Family of Vietnam identified: "...to better exercise and protect rights and benefits of these individuals, the institution of the related matters should also be further researched and completed on the principle of respecting and ensuring the equality and anti-discrimination, provide appropriate legal procedure to the living as husband and wife of same-sex people, in order to minimize the legal risk that could arise with them and other related social relations".²⁰ Apart from that, some legally operating organization for the right of LGBTI people²¹ as well as and the LGBT people themselves have actively participated in the above-mentioned process of advocating for equal marriage. One of the achievements of the campaign advocating for equal marriage is building the capability, self-confidence and pride for the LGBTI society.²² Thanks to the way of advocating, which is based on human rights and the equal, non-discriminated value, the LGBTI society "knows how to express their anger when their rights are violated".²³ The homosexuals in particular, and the LGBTI people in general, have actively participated in the process of consulting, commenting on the draft proposal of the amended Law on Marriage and Family.²⁴ The LGBTI society has succeed in building the positive spirit, pride

¹⁷In the past, the 1959 Law on Marriage and Family of Vietnam did not have the regulation forbidding marriage between same-sex people and the content of the regulation used the term "wife", "husband" to indicate "woman", "man" in the marriage and family; the 1986 Law on Marriage and Family of Vietnam did not have the regulation forbidding marriage between same-sex people and the content of the regulation used the term "wife", "husband" to indicate "woman", "man" in the marriage and family; The 2000 Law on Marriage and Family of Vietnam (Clause 5 Article 10) forbid marriage between same sex people.

¹⁸Hong Quang Truong (2013). Complete the regulation on human rights, citizens' rights in the drafted amendment of the 1992 Constitution. *The Journal of Legislative Studies*, 5(237), 31-37.

¹⁹Ministry of Justice of Vietnam (2012). *Dispatch regarding the assessment of shortcomings, limitation in the regulations of the 2000 Law on Marriage and Family and in the practical implementation of the 2000 Law on Marriage and Family (3460/BTP-PLDSKT)*. Hanoi.

²⁰Ministry of Justice of Vietnam (2019), *supra*, note 16.

²¹SEE (established in 2007) and ICS Center (established in 2008) were two of the first organizations which promoted and advocated for the right of LGBTI people in Vietnam.

²²SEE, CEPEW (2015). *Vận động và chiến lược vận động của các tổ chức phi chính phủ Việt Nam (Advocacy and the strategy of advocacy of non-governmental organizations in Vietnam)*. <http://isee.org.vn/wp-content/uploads/2018/11/van-dong-va-chien-luoc-van-dong-cua-cac-to-chuc-phi-chinh-phu-viet-nam.pdf> Accessed 30 July 2021.

²³Id.

²⁴Vuong Anh Ngo (2013). "Mọi tình yêu đều bình đẳng" - góp ý cho Dự thảo sửa đổi Luật Hôn nhân và Gia đình năm 2000 ("All loves are equal" - Comments on the Drafted Amendment of the 2000 Law on Marriage and Family). Communist electronic magazine. <https://tapchiconsan.org.vn/web/quest/hoat-ong-cua-lanh-ao-ang-nha-nuoc/-/2018/23903/%E2%80%9Cmọi-tình-yêu-đều-bình-đẳng%E2%80%9D--góp-ý-cho-dự-thảo-sửa-đổi-luật-hôn-nhân-và-gia-đình-năm-2000.aspx>. Accessed 10 August 2021.

¹⁶Ministry of Justice of Vietnam (2019). *Report on the implementation of the 2014 Law on Marriage and Family (255/BC-BTP)*. Hanoi, 9.

and the for-a-common-purpose attitude. This helps the society to have the participation and support from many people. This is the foundation to make changes in the society and law in a peaceful and civilized way. Through this, the LGBTI people have actively participated in the development and actively advocating the policies for themselves and the society. That also is the objective of the approach based on human rights. It can be seen that though moving from the rule “forbidding same-sex marriage” (Clause 5 Article 10 in the 2000 Law on Marriage and Family of Vietnam) to regulating currently that “the Government does not recognize marriage between same-sex people” (Clause 2 Article 8 in the 2014 Law on Marriage and Family of Vietnam) is basically not different, it represents a certain level of innovation in the law-making process in Vietnam. This shows that the matter of human rights is more and more considered in the procedure of legislating regulations. The 2014 Law on Marriage and Family of Vietnam does not recognise marriage between same-sex people but also does not intervene in their lives when living together. The “do not recognize” regulation also helps reduce the discrimination in the society with the same-sex people living together of the LGBTI society. This is also a succession in the awareness about respecting legitimate rights and benefits of LGBTI people in particular, and the vulnerable people society in general.

Fourthly, specific rights of LGBTI people are recognized in a more sufficient manner.

Vietnamese law has recognized the right to determine gender²⁵ of intersex people as a personal right in the 2005 Civil Code (Article 36) and later in the 2015 Civil (Article 36). Accordingly, “redetermination of gender of a person is implemented in the case the gender of such person is subject to a congenital defect or has not yet been accurately formed and requires medical intervention in order to clearly identify the gender” (Clause 1 Article 36 of the 2015 Civil Code of Vietnam). Regulations on definition of gender identity have been particularly provided in Decree No. 88/2008/ND-CP dated 05 August 2008 of the Government on redetermination of gender (as amended and supplemented by Decree No. 155/2018/ND-CP dated 12 November 2018 of the Government amending and supplementing some regulations regarding investment and business conditions under State management of the Ministry of Health). It can be seen that the content of Article 36 of the 2015 Civil Code is basically not different from the one of Article 36 of the 2005 Civil Code. However, the latter Civil Code has changed from the term “[a]n individual has the right to be redetermined his or her gender ...” to the term “[a]n individual has the right to redetermine his or her gender...”. By abolishing the term “to be” in the law-making technique, to some degree, this helps to strengthen that this right belongs to every individual, and is not granted by the State to individuals as this right is a personal right, attached to each individual. While the right to redetermine gender of intersex people has been recognized for a long time, the right to gender transition of transgender people has been recently recognized (such as in the 2015 Civil Code of Vietnam). In the previous time, during the law-making process of the 2005 Civil Code of Vietnam²⁶, the issue of the right to gender transition was mentioned²⁷ but yet to be recognized. From the practice in Vietnam, it is shown that gender transition is numerous transgender people’s need. During the drafting process of the 2015 Civil Code of Vietnam,

the issue that whether the right to gender transition should be recognized or not received numerous attention and contentious debates. In addition to arguments advocating this right (such as ensuring human rights and the right to live for true self and many others), there were contrary arguments (such as disturbing families, society, traditional values, or abuse of gender transition and many others). On the date of 24 November 2015, 399 out of 446 delegates of the Vietnam National Assembly XIII Session (accounting for 80.77%) consented to regulations on gender transition.²⁸ Following this, the 2015 Civil Code of Vietnam acknowledges gender transition in the Section of personal rights (Article 37): “Gender transition is conducted in accordance with law. An individual whose gender has been changed has the right and obligation to register civil status changes in accordance with the law on civil status; and has personal rights suitable to the transitioned gender pursuant to provisions of this Code and other relevant laws”. This is a milestone in the legislative thinking as well as a bright point in the law-making process of the National Assembly XIII Session with regard to human rights and citizens’ rights. This indicates that the laws have satisfied the practical needs of society. Unlike the right to same-sex marriage, the transgender issue has peculiarities that should be recognized in a short time. For instance, some Vietnamese citizens, who travelled to foreign countries to have surgery and returned to Vietnam afterwards, have faced challenges or difficulties such as some were sexually abused without any proper protection; some were not allowed to change personal documents, causing difficulties in daily work; or some had underground surgery posing risk to health and life, and many others.

Fifth, legal grounds for protecting the rights of LGBTI people are increasingly improved

Previously, in Vietnam, the practical implementation of the 1999 Criminal Code of Vietnam (amended and supplemented in 2009) shows that there were some cases engendering difficulties to procedure-conducting agencies due to a lack of uniformity in the understanding of sexual intercourse crime, or explicit guidance from competent State agencies (such as same-sex rape and molestation; or transgender rape but the victim’s transitioned gender was not recognized and many others). At the present, the 2015 Criminal Code of Vietnam (amended and supplemented in 2017) shows positive amendments in a way more likely to safeguard human rights (including those for LGBTI people) in practice, such as this regulation which reads that “[a]ny person who uses violence or threatens to use violence or takes advantage of the victim’s defenselessness or other tricks to engage in non-consensual sexual intercourse or other sexual activities shall face a penalty of 02 - 07 years’ imprisonment” (Clause 1, Article 141 (Rape)). The term “engaging in other sexual activities” is also added to other Articles such as: Rape of a person under 16 years of age (Article 142), Sexual abuse (Article 143), Sexual abuse of a person aged from 13 to under 16 years of age (Article 144), Engaging in sexual intercourse or other sexual activities with a person aged from 13 to 16 years of age (Article 145), Molestation of a person under 16 years of age (Article 146). It can be seen that, the regulation on “engaging in other sexual activities” will create a foundation to protect LGBTI people when getting molested in real life. On the date of 01 October 2019, the Council of Judges of the Supreme People’s Court issued the Resolution No. 06/2019/NQ-HDTP guiding the implementation of Articles 141, 142, 143, 144, 145, 146 and 147 of the Criminal Code regarding hearings of sexual abuse cases against people under 18 years of age (which has come into force from 05

²⁵The author uses the term “determination of gender” to ensure the true nature of intersex people. Based on the bodily characteristics of intersex people, they need surgery to determine (to choose) a gender as male or female. Therefore, the use of the term “redetermination of gender identity” in the Vietnamese law (for instance, the 2015 Civil Code and relevant guiding documents) is not precise.

²⁶The 2015 Civil Code replaced the 2005 Civil Code.

²⁷Khanh Hong (2006). Transgender people should be acknowledged. <https://vnexpress.net/tin-tuc/thoi-su/nguoi-chuyen-doi-gioi-tinh-phai-duoc-thua-nhan-2072247.html> Accessed 20 July 2021.

²⁸Vinh Quynh (2015). Quốc hội thừa nhận quyền chuyển đổi giới tính (The National Assembly acknowledges the right to gender transition). <http://cand.com.vn/Su-kiem-Binh-luan-thoi-su/Quoc-hoi-thua-nhan-quyen-chuyen-doi-gioi-tinh-373882/>. Accessed 24 August 2021.

November 2019). According to Clause 2 Article 3 of this Resolution, other sexual activities mean activities of same-sex or heterosexual people who use the male genital organ or other body parts (for instance: fingers, toes or a tongue and so forth), or sex tools to penetrate into the female genital organ, the mouth or the anus of another person to any kind of penetration level. In addition, regarding custody and temporary detention, Item a Clause 4 Article 18 of the 2015 Law on Enforcement of Custody and Temporary Detention of Vietnam prescribes that homosexuals and transgenders, if being taken into custody or detained, are allowed to allocate with private cabins. As for the measure of prison sentence enforcement, Clause 3, Article 30 of the 2019 Law on Criminal Judgment Execution stipulates that inmates who are homosexuals, transgenders, or whose gender has not yet been identified may be detained separately. These are two rare laws of Vietnam mentioning the terms "homosexual", "transgender" or "gender undetermined". These regulations, to some extent, ensures these people (particularly, transgender people) circumvent discrimination from others when being taken into custody, detained or sentenced to prison.

According to the author, the development of regulations on the LGBTI rights in Vietnam within the past years comes from numerous following factors:

1. The 2013 Constitution emphasizes that "human rights and citizens' rights in the political, civil, economic, cultural and social fields are recognized, respected, protected and ensured in accordance with the Constitution and law" (Clause 1 Article 14); "Human rights and citizens' rights may only be limited in accordance with law in necessary cases for reasons of national defense, national security, social safety and order, social ethics or public health" (Clause 2 Article 14) and "All people are equal before law, no one is subject to discriminatory treatment in the political, civil, economic, cultural or social life" (Article 16). These new regulations of the 2013 Constitution have added and developed the constitutional basis for improving the legal system on human rights in general and particularly, LGBTI rights in Vietnam.
2. The development trend of legal systems of other countries in the region impacts on the law-making process and implementation of regulations on LGBTI rights in Vietnam. In recent times, some Asian countries have shown development in a way to more likely to protect and promote LGBTI rights (such as Taiwan, Thailand and many others). This development trend has impacted on Vietnam, particularly the legislative process (reflected in the 2015 Civil Code, the 2015 Criminal Code, amended and supplemented in 2017 and many others).
3. Other factors regarding place of residence, age, education background, marital status, working position and many others also affect opinions regarding LGBTI people. According to a survey published in 2013 regarding same-sex marriage in Vietnam,²⁹ it is provided that people living in cities showed stronger support for same-sex marriage compared to those living in rural areas; young people under 30 years of age support [for same-sex marriage] as twice as middle-aged people; people having higher education tend to show more support (showing the positive role of the development); unmarried people tend to support the legalization of same-sex marriage. Farmer and student groups tend to show more support compared to those doing business, trading and services jobs and so forth.
4. The mass media plays an important role in shaping public opinion. In recent times, (positive) information and documents

on LGBTI people and LGBTI rights have been increasingly disseminated in the mass media in Vietnam. Nowadays, due to the ubiquity of the Internet, it is easier for State agencies, people and the whole society to access the mass media than official documents, thus, they are more affected by the mass media.

Challenges for regulations on LGBTI rights in Vietnam

Even though there have been reforms in thinking in the law-making process and the implementation of regulations on LGBTI rights, like other countries in the world, arising out of numerous different factors (such as traditions, beliefs and legislative levels and many others), LGBTI issue still poses some challenges to Vietnam as follows:

Firstly, regulations on LGBTI rights have yet to satisfy some important needs of LGBTI people in Vietnam.

Although Vietnamese law has recognized numerous LGBTI rights in a similar manner to other subjects in society (such as heterosexual people) and some specific rights of LGBTI people (such as the right to gender transition, or the right to determine gender), Vietnamese law has yet to recognize some rights such as the right to same-sex marriage, the right to adoption and the right to surrogacy of LGBTI couples and many others. In practice, according to a survey conducted on a number of 5999 LGBT people,³⁰ almost all participants in the research (99.8%) called for advocacy of legislative change towards recognition of equality of same-sex couples and the right to marriage like other heterosexual couples. In addition, according to this survey,³¹ almost all research samples (96.1%) showed the desire that same-sex couples should be allowed to adopt under Vietnamese law; the majority (95.5%) hoped that there would be a legal environment facilitating assisted reproductive activities, in particular, artificial insemination and many others for same-sex couples who would like to have children.

Secondly, in practice, the enjoyment of LGBTI rights is confronted with some challenges.

As mentioned above, gender transition has been recognized in the 2015 Civil Code of Vietnam. Hence, after nearly five years of implementing the 2015 Civil Code, until the present, the provisions prescribed in Article 37 of this Code have not been specified and accordingly also not been actualised. Therefore, the right to gender transition is still being "suspended" and transgender people have not had the full entitlement to the enjoyment of this right.³² In addition, the promotion, dissemination and education of official information on sexual orientation and gender identity are not comprehensive and comprehensive. For instance, while some health organizations around the world (such as the World Health Organization, or the American Psychiatric Association) have already affirmed that LGBTI is not a disease or mental disorder and provide specific warnings and instructions in this regard. However, in Vietnam, practices in numerous hospitals and by doctors have not reflected this update.³³ Therefore, the fact that medical staff and institutions still lack understanding for LGBTI people or some families have "forced"

³⁰SEE, *supra*, note 6, 56.

³¹SEE, *supra*, note 6, 57.

³²Lua Tam (2019). Quyền chuyển đổi giới tính: 4 năm "treo" hướng dẫn, phát sinh nhiều hệ lụy (The transgender right: "suspended" guidance for 4 years, causing consequences). <https://cuoituan.tuoiitre.vn/van-de-su-kien/quyen-chuyen-doi-gioi-tinh-4-nam-treo-huong-dan-phat-sinh-nhieu-he-luy-1506320.html>. Accessed 10 September 2021.

³³SEE, The Huy Luong and Quynh Phuong Pham, *supra*, note 10, 64.

²⁹Institute of Sociology, Health Strategy and Policy Institute, iSEE, *supra*, note 1, 52-56.

LGBTI people to treatment is not uncommon.³⁴

RECOMMENDATION

From the author's perspective, the improvement of regulations on LGBTI rights in Vietnam will be confronted with advantages and challenges in the future. Regarding the advantages, some advantages include: the law-making activity which is more likely to follow the human rights-based approach; the LGBTI community which is more actively involved in the State's dialogue and law-making processes; full and official information on LGBTI people as well as the socio-economic development showing positive effects and many others during the previous time. On the other hand, other factors such as traditions, beliefs as well as disparities in the legislative levels are challenges having impacts on the improvement of regulations on LGBTI rights in Vietnam. According to the author, Vietnam should continue to complete the law on rights of LGBTI people as well as promote the LGBTI people to enjoy their rights in practice. Some solutions that need attention are:

Firstly, continue to widen the perspective on gender equality

Equality has always been considered as the foundation of the stability and progress of all societies.³⁵ According to the author, the internal function of the gender equality not only is restricted in the equal relationships between man and woman but also includes the equality between sexual orientations and gender identities so as to fulfill the variety and development of the current society. This concept should firstly be supplemented into the 2006 Law on Gender Equality of Vietnam. After that, specialized laws in each field (civil, labour, etc.) could integrate these elements in order to contribute to the anti-discrimination and anti-stigma against LGBTI people. For example, the Labor Code should represent the non-discrimination spirit based on gender orientation, gender identity, protecting the rights and benefits of all workers; represent through the compulsory labor regulations and is committed to seriously and consistently enforced. In the future, it could be researched to develop a common law on preventing the discrimination in order to identify general and basic rules for all fields, which will include the discrimination on gender, gender orientation, and gender identity. With that foundation, the specialized laws will be specified in each field.

Secondly, continue to complete the law to acknowledge a legal form for the same-sex living together of LGBTI couples

In terms of constitutional basis, Article 36 of the 2013 Constitution of Vietnam regulated that: "*Man, woman has the right to get married or divorced. Marriage follows the principle of voluntariness, progressiveness, monogamy, equality and mutual respect between husband and wife.*" It can be seen that instead of defining marriage, the 2013 Constitution only regulated the right to get married. In fact, a gay man is still a man, a lesbian is still a woman, then they will still have the right to get married following current regulations of the 2013 Constitution. The regulation on the right to get married of "man, woman" does not affect or restrict the right to get married of the homosexuals. The "monogamy" principle, mentioned in the 2013 Constitution, should be understood as "single spouse", with the internal concept as "no one could get married with other while in a marital relationship with another person". This principle also does not mean that a marriage has to be between one man and one woman.

What emphasized here is that "one-one" not "husband-wife". Therefore, the marriage between two same-sex people still satisfies this rule.³⁶ Thus, we should understand the rule of "a man, or a woman has the right to get married" as a regulation to acknowledge the right to get married of a citizen more than as a regulation to define marriage or to restrict the subject from enjoying this right. In practice, the same-sex living together relationship has been existed, and it keeps representing more and more obvious in the Vietnamese society.³⁷ The existence of the same-sex living together relationship has put forward many requirements for the legal system (form of living together, property and personal relationships, social welfare and so forth) According to the author, the consideration on acknowledging the same-sex living together relationship in Vietnam by a legal form is very necessary in current period. Acknowledging the right of LGBTI people in the law is an inevitable matter, a legitimate need, which helps respecting and protecting the dignity of LGBTI people as well as protecting the social order, resolving social contradictions arisen when the LGBTI people find, express their personal needs and freedom. In the last period, the United Nations Organization has recognized the concept of a wide range in the authentication the progress - instead of a fixed term - in the definition of family. The United Nations Organization noted that: "...the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition".³⁸ Committee on the Rights of the Child of the United Nations announced in the "Evaluation about the family environment" that we need to reflect "different family structures arising from various cultural patterns and emerging familial relationships".³⁹ One kind of the familial relationships in this context could be understood as the variety in sexual orientation, which is an important basis for a family of same-sex couples. This is also the subject that needs to be considered by the Vietnamese lawmakers in order to supplement to the concept of family so as to create the equality and awareness movement about family in Vietnam during the upcoming time. Though the recognition of the legal form for same-sex living together relationship in Vietnam is currently in need and legitimate, it should be considered under the situation that the definition of marriage, family in Vietnam is not unified, sometimes modest and affected by the old concepts.

³⁶An interesting fact is that until the 1992 Constitution, there was no term regulating the issue of someone has the right to get married. In 2000, when the Law on Marriage and Family of Vietnam added the Clause 5, Article 10 on forbidding same-sex marriage then the 1992 Constitution of Vietnam (amended and supplemented in 2001) still lacked the regulation on the right to get married. In the history, the 1959 Constitution of Vietnam did not have any regulation on the "monogamy" rule. And in fact, before 1959, polygamy (in particular is multiple wives) was still not forbidden in the law. Just when the first Vietnamese Law on Marriage and Family was released in 1959, that polygamy was forbidden by the rule of "monogamy" (Article 1), "forbid to have second wife" (Article 3) and "person having wife or husband is forbidden to get married with another person" (Article 5). In reality, this is the period when the law hoped to protect more rights for the woman in marriage, and had detailed rules on "right to get re-married" of widows, eliminated the gender prejudice... Since the 1980 Constitution of Vietnam, the "monogamy" rule had been officially included and kept as is until the current 2013 Constitution. So, starting from the inheritance and historical origin, we should understand the "one husband, one wife" rule as the regulation on monogamy, not as the regulation restricting same sex marriage.

³⁷See also: Hong Quang Truong (2013). *Summary Report the result of the scientific research "Identify legal issues about the homosexuals, bisexuals and transgenders community in Vietnam today"*. Institute of Legal Studies, Ministry of Justice, Hanoi, Vietnam, 83-98; Thi Thu Nam Nguyen, Thanh Long Vu và Thanh Tra Pham, *supra*, note 11, 16-23; Jeffrey Hays (2014). *Homosexuality in Vietnam*. http://factsanddetails.com/southeast-asia/Vietnam/sub5_9c/entry-3421.html. Accessed 10 September 2021; and so forth.

³⁸UN Human Rights Committee (27 July 1990). CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses. <https://www.refworld.org/docid/45139bd74.html>. Accessed 16 September 2021.

³⁹UN Committee on the Rights of the Child (8 March 1994). Report of the UN Committee on the Rights of the Child: Fifth Session (10-28 January 1994), CRC/C/24. <https://www.refworld.org/docid/3f4765d04.html>. Accessed 16 September 2021.

³⁴Linh Dieu (2016). Đánh đập để... "hết đồng tính" (Beating as a "cure for homosexuality"). <https://dantri.com.vn/suc-khoe/danh-dap-de-het-dong-tinh-20160625071904258.htm>. Accessed 10 September 2021.

³⁵Khanh Vinh Vo and others, *supra*, note 12, 386.

Therefore, it could not be changed in a short duration.⁴⁰ According to the author, for instant, the registered living together form could be recognized (civil union/civil partnerships) for same-sex couples in Vietnam. This form has been applied by some countries around the world and it is a stepping stone to create the condition for further consideration, assessment on same-sex relationship before an acknowledgement of same-sex marriage. Registered living together relationship does not affect the institution on traditional marriage, without any noticeable disturbance in the Vietnamese living society. It can be noticed that the process looking for a solution to meet the needs, particularly the need for happiness of LGBTI couples, may be extended in the future. Apart from that, some other legal issues related to the relationship between parents and child, adopting child, giving birth with assisted reproductive technology for same-sex couple of two men or the right to represent each other of same-sex couples are also challenges to Vietnamese lawmakers.

Thirdly, bringing the gender transition into reality

According to the author, the National Assembly and the Government have to rush the progress of putting the Law on Gender Transition into the Agenda for the issuance of laws and ordinances of the National Assembly in order for the right to gender transition not to be "hung" as current. The Law on Gender Transition needs to solve several following problems:⁴¹ (1) The certain to which can be considered as transgender; (2) Requirements on age of the transforming person; (3) Requirements on marital status of the transforming person; (4) Some issues related to the procedure of gender transition; (5) Number of times to be entitled to gender transition; (6) Medical center implementing the gender transition; (7) Recognition for people having gender transition in the past; (8) Expenses for medical intervention of gender transition; (9) The right to get married of transgenders after the gender transition; (10) The impact on other legal documents (law on civil status and legal documents, law on sport, law on gender determination and others). According to the author, when drafting the Law on Gender Transition, there needs to be an appropriate and thorough approach based on rights, which will direct the law to be about rights, not just simply about processes and procedure. Moreover, the policies in this law must solve the issues arisen when specifying problems of gender transition (for example, relationship with wife/husband/child of the person before their gender transition (if any)).

Fourthly, some solutions to promote the enjoyment of LGBTI rights in practice

According to the author, the issues of updating, propagating, educating knowledge about sexual orientation and gender identity for related subjects needs to be considered in Vietnam. For example, the health sector needs to inform thoroughly scientific knowledge - confirmed worldwide - about LGBTI to all medical system as well as people in the society, the action of "fixing" the homosexuality, gender transition and so forth must be strictly forbidden; the education sector has to continue to add sex education program, in which the issue related to sexual orientation and gender identity must be added for the youth in general and for students in all levels in particular and so forth.

⁴⁰According to a previous survey, there was 77% of people, who participated in the survey, (in 4 provinces/cities) agreed that it was a must to protect the rights of homosexuals, in which only 36.6% agreed on letting homosexuals to get married. See also: Thi Thu Nam Nguyen (2012). *Report on Social opinion regarding homosexuals and same-sex marriage*. Hanoi, Vietnam.

⁴¹See also: Hong Quang Trung (2019). *LGBTI legal rights in Vietnam*. Dphil thesis, Graduate Academy of Social Sciences, 135-142.

CONCLUSION

It can be seen that, coming with the development of the society, Vietnam has got innovation in the legislative thinking towards the rights of LGBTI people. This truly is an effort of Vietnam in the field of protecting human rights. In the upcoming time, issues related to same-sex living together, bringing the right of gender transition into reality and so forth will continue to be discussed in many different extend. The value of equality and freedom needs to be kept as basic value throughout the whole process of legislating and implementing regulations on rights of LGBTI people in Vietnam. There needs to be a thorough and correct viewpoint towards people with different sexual orientation and gender identity in the society. Indeed, that we research, assess the rights of LGBTI people does not mean a promotion for a new and deviant trend. It should be considered as a voice speaking for them, helping the society to become more human. To create a truly equal society is a human value of the law. The most civilized society is the society having a legal background filled with human love and having a stable human foundation

REFERENCES

1. Linh Dieu (2016). Đánh đập để... "hết đồng tính" (Beating as a "cure for homosexuality"). <https://dantri.com.vn/suc-khoe/danh-dap-de-het-dong-tinh-20160625071904258.htm>. Accessed 10 September 2021.
2. General Statistic Office of Vietnam (2020). *Results of the Survey on population and housing census in 2019*. Hanoi, Vietnam: Thong Ke Publishers.
3. Hays J. (2014). Homosexuality in Vietnam. http://factsanddetails.com/southeast-asia/Vietnam/sub5_9c/entry-3421.html. Accessed 10 September 2021.
4. Hida (2015). How Common is Intersex? An Explanation of the Stats. <https://www.intersexequality.com/how-common-is-intersex-in-humans/> Accessed 30 August 2021.
5. Khanh Hong (2006). Người chuyển đổi giới tính phải được thừa nhận (Transsexual people must be acknowledged). <https://vnexpress.net/tin-tuc/thoi-su/nguoi-chuyen-doi-gioi-tinh-phai-duoc-thua-nhan-2072247.html>. Accessed 20 July 2021.
6. Institute of Sociology, Health Strategy and Policy Institute, Institute for Studies of Society, Economy and Environment (iSEE) (2013). *Research report on the result of the referendum on same-sex marriage*. Hanoi, Vietnam: The Gioi Publishers.
7. iSEE (2012). *The desire to be oneself: Transgender people in Vietnam - practical and legal issues*. Hanoi, Vietnam: The Gioi Publishers.
8. iSEE, CEPEW (2015). Vận động và chiến lược vận động của các tổ chức phi chính phủ Việt Nam (Advocacy and the strategy of advocacy of non-governmental organizations in Vietnam). <http://isee.org.vn/wp-content/uploads/2018/11/van-dong-va-chien-luoc-van-dong-cua-cac-to-chuc-phi-chinh-phu-viet-nam.pdf> Accessed 30 July 2021.
9. iSEE, The Huy Luong and Quynh Phuong Pham (2016). *"Is it because I am LGBT?" - Discrimination based on sexual orientation and gender identity in Vietnam*. Hanoi, Vietnam: Hong Duc Publishers.
10. iSEE (2019). *Same-Sex Partnership Report: The love and cohabitation of homosexual, bisexual and transgender people in Vietnam*. Hanoi, Vietnam.
11. Ministry of Justice of Vietnam (2012). *Dispatch regarding the assessment of shortcomings, limitation in the regulations of the 2000 Law on Marriage and Family and in the practical implementation of the 2000 Law on Marriage and Family (3460/BTP-PLDSKT)*. Hanoi.

12. Ministry of Justice of Vietnam (2019). *Report on the implementation of the 2014 Law on Marriage and Family (255/BC-BTP)*. Hanoi.
13. Vuong Anh Ngo (2013). "Mọi tình yêu đều bình đẳng" - góp ý cho Dự thảo sửa đổi Luật Hôn nhân và Gia đình năm 2000 ("All loves are equal" - Comments on the Drafted Amendment of the 2000 Law on Marriage and Family). Communist electronic magazine. <https://tapchiconsan.org.vn/web/guest/hoat-ong-cua-lanh-ao-ang-nha-nuoc/-/2018/23903/%E2%80%9Cmọi-tình-yêu-deu-binh-dang%E2%80%9D---gop-y-cho-du-thao-sua-doi-luat-hon-nhan-va-gia-dinh-nam-2000.aspx>. Accessed 10 August 2021.
14. Thi Thu Nam Nguyen (2012). *Report on Social opinion regarding homosexuals and same-sex marriage*. Hanoi, Vietnam.
15. Thi Thu Nam Nguyen, Thanh Long Vu and Thanh Tra Pham (2013). *Same-sex living together: Empirical experiences and the pursuit of couple happiness*. Hanoi, Vietnam: The Gioi Publishers.
16. Preves S. E. (2003). *Intersex and Identity: The Contested Self*. Rutgers University Press.
17. Vinh Quynh (2015). Quốc hội thừa nhận quyền chuyển đổi giới tính (The National Assembly acknowledges the right to gender transition). <http://cand.com.vn/Su-kien-Binh-luan-thoi-su/Quoc-hoi-thua-nhan-quyen-chuyen-doi-gioi-tinh-373882/>. Accessed 24 August 2021.
18. Jennifer Robison (2002). What Percentage of the Population Is Gay?. <http://news.gallup.com/poll/6961/what-percentage-population-gay.aspx>. Accessed 30 August 2021.
19. Lua Tam (2019). Quyền chuyển đổi giới tính: 4 năm "treo" hướng dẫn, phát sinh nhiều hệ lụy (The transgender right: "suspended" guidance for 4 years, causing consequences). <https://cuoituan.tuoiitre.vn/van-de-su-kien/quyen-chuyen-doi-gioi-tinh-4-nam-treo-huong-dan-phat-sinh-nhieu-he-luy-1506320.html>. Accessed 10 September 2021.
20. Tung Thanh, Chau Lien (2013). Hàng loạt trẻ em phải xác định lại giới tính (Numerous children to have their genders redetermined). <http://thanhnien.vn/suc-khoe/hang-loat-tre-em-phai-xac-dinh-lai-gioi-tinh-462653.html>. Accessed 10 August 2021.
21. Hong Quang Truong (2012). Rationale for rights of homosexuals. *The Journal of Legislative Studies*, 24(232), 22-28, 36.
22. Hong Quang Truong (2013). *Summary Report the result of the scientific research "Identify legal issues about the homosexuals, bisexuals and transgenders community in Vietnam today"*. Institute of Legal Studies, Ministry of Justice, Hanoi, Vietnam.
23. Hong Quang Truong (2013). Complete the regulation on human rights, citizens' rights in the drafted amendment of the 1992 Constitution. *The Journal of Legislative Studies*, 5(237), 31-37.
24. Hong Quang Truong (2019). *LGBTI legal rights in Vietnam*. Dphil thesis, Graduate Academy of Social Sciences.
25. UN Human Rights Committee (27 July 1990). CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses. <https://www.refworld.org/docid/45139bd74.html>. Accessed 16 September 2021.
26. UN Committee on the Rights of the Child (8 March 1994). Report of the UN Committee on the Rights of the Child: Fifth Session (10-28 January 1994), CRC/C/24. <https://www.refworld.org/docid/3f4765d04.html>. Accessed 16 September 2021.
27. Khanh Vinh Vo and others (2015). *Human rights: Postgraduate curriculum*. Hanoi, Vietnam: Science Social Publishers.
