

# HOMOSEXUAL RIGHTS AND SAME-SEX MARRIAGE IN VIETNAM

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**Abstract** - Homosexuals in Vietnam face many prejudices, stigmas, and discrimination from family, society, friends, and from people in the same community as in some other countries in the world. Assessed objectively and comprehensively, the issue of homosexual rights appeared quite late in the Vietnamese legal system (only the right to determine gender has been recognized since 2005). Over the past five years, the legal system has been amended and supplemented with a number of positive and developed provisions on the rights of these subjects (marriage and family, civil, criminal justice, etc.). However, in general, the Vietnamese legal system on this issue still has some gaps, not covering all homosexual and transgender subjects (same-sex cohabitation relationships, property relationships, child rights, criminal judgment execution, etc.). Basically, the Vietnamese law on this subject's rights still lacks a lot of regulations compared to the common standards of the world.

**Keywords:** Homosexuals; Same-sex marriage; Discrimination; Homosexual rights; Vietnam's Civil Code.

## INTRODUCTION

The 1948 Universal Declaration of Human Rights affirmed human rights in general, including the rights of homosexuals, but stigma, discrimination, and violence against them persist throughout the world. This became a special concern of the United Nations on human rights in the 1990s of the twentieth century and continued throughout the early years of the twenty-first century. Laws in some countries even discriminate against and criminalize same-sex relationships, and homosexuals are arrested, prosecuted, and imprisoned (Office of the United Nations High Commissioner for Human Rights 2012).

In any era, social life always has a certain diversity and richness. The expression of emotions, feelings, or sexual orientation is also included in that rule. In the past, we almost only talked about a society with families that are a combination of a man and a woman for the purpose of maintaining the breed. At that time, the fact that a person loved someone of the same sex or wished to have another gender was very strange, even considered morbid<sup>1</sup>.

Like many countries in the world, homosexual people are a minority group in terms of population (besides the heterosexual majority group) and increasingly clearly present in Vietnamese society. Overall, according to Vietnamese law, this group of people currently has almost all of the same rights as other heterosexuals. However, for various reasons, they have not yet been legally recognized for some rights, such as the right to marry the same sex, the right to have children, or to have recognized rights but no enforcement mechanism (gender transition) ... Besides, some rights in other areas, such as criminal justice, civil rights, legal aid, gender determination, etc., still have barriers in practice. Along with the traditional idea of social classes, these things are often looked down on and treated badly. From that, it can be seen that the law on homosexual rights in Vietnam still has certain gaps.

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### 1. Homosexuals (Lesbian, Gay)

Currently, heterosexual people make up the majority of society (and many people think that only heterosexuality is natural). On the other hand, homosexual groups are a small part of society, which many people think is strange. But it's also important to make sure that these are all completely normal ways for people to be sexual. For example, on May 17, 1990, the World Health Organization (WHO)

<sup>1</sup> Institute of Legal Science - Ministry of Justice (2013), the research project at grassroots level "Identifying legal issues about homosexualsexual and transgender community in Vietnam currently", Ha Noi, Chairman: Truong Hong Quang; p8.

removed homosexuality from the list of mental illnesses<sup>2</sup>. A person of either male or female gender can be heterosexual, homosexual, bisexual, or asexual. Seeing a sexual orientation as unnatural because many people do not know about it and do not understand it leads to knowing only heterosexuality without knowing or discriminating against other less common sexual orientations.

Homosexuals (lesbians, gays) From a scientific perspective, according to the point of view of the American Psychological Association (APA), homosexuality is not a psycho-physiological disorder at all but a natural biological phenomenon, influenced by the complex interplay of genetic and environmental factors in the early stages of pregnancy<sup>3</sup>. Same-sex sexual acts and same-sex love relationships are one of the normal forms of attachment to meet basic human needs for love, closeness, and care. The APA does not provide a scientific explanation for the above phenomenon, but only provides evidence and research to reach an obvious conclusion about the existence of that sexual orientation in order to eliminate homosexuality from mental health disorders and social guidance to help homosexuals integrate into the community so that people have a more empathetic view of these people. The APA removed homosexuality from the list of symptoms and mental disorders in 1973. At the same time, in December 1992, the APA issued a call to the world to act together to protect homosexual rights<sup>4</sup>. The results of studies, statistics, and surveys by psychiatry and pediatric researchers have concluded that homosexuality is not a mental disorder but a normal phenomenon in nature. People who have this sexual orientation are not entirely of their own choosing. Therefore, it can be reaffirmed that homosexuality is not a third gender, as many people think, and it is not a trend. Biologically, homosexuals are still either males or females.

## 2. Homosexual rights

*Firstly, homosexual rights are essentially human needs.*

Like other subjects in society, homosexual rights are all inherent natural needs, abilities, and privileges. This is shown from two perspectives: (i) equality in the right to life and liberty; (ii) the right to pursue happiness.

Regarding the right to life and freedom of homosexuals, ordinary people are like all other individuals in society, are capable of performing their obligations and are entitled to enjoy the same rights as other people. One of the most important rights is the right to be recognized and respected. Thus, the right to publicize one's sexual orientation and gender identity, as well as to live according to those instincts...is a part of freedom.

Regarding the right to pursue happiness, first of all, it is necessary to understand that the pursuit of happiness is a form of expression of freedom. Human beings are defined by their ability to seek happiness and the life values they choose for themselves. This is evident in all socio-political regimes. One of those life values comes from getting married, building a happy family, and being respected and protected by the state. For homosexuals, remarriage is relatively difficult because the right of same-sex couples to marry is not recognized everywhere or the form of marriage is sometimes superseded by other more restrictive legal forms.

*Secondly, homosexual rights are a new right compared to human rights in general.*

The level of recognition and protection of these rights of homosexuals in different countries is not the same (recognized or unrecognized, limited, restricted rights, etc.). For example, the marriage rights of same-sex couples can take many forms: the full right to marriage or registered cohabitation. Thus, it can be seen that homosexual rights include two main groups: general and specific rights groups.

Besides, other needs about family affection, medical or legal treatment, etc., are also necessary and realistic desires. These needs are legitimate and need to be recognized and implemented under an appropriate legal mechanism to ensure homosexuals can live as they are.

However, when homosexuals openly reveal their sexual orientation and gender identity and exercise their right to "freedom", they face many obstacles from social prejudices and wrong views

<sup>2</sup> Susan D Cochran, Jack Drescher, Eszter Kismödi, Alain Giami, Claudia García-Moreno, Elham Atalla, Adele Marais, Elisabeth Meloni Vieira & Geoffrey M Reed, Proposed declassification of disease categories related to sexual orientation in the International Statistical Classification of Diseases and Related Health Problems (ICD-11), 2014.

<sup>3</sup> Royal College of Psychiatrists, Submission to the Church of England's Listening Exercise on Human Sexuality, <http://www.rcpsych.ac.uk/members/specialinterestgroups/gaylesbian/submissiontothecofe.aspx>, access date: October 10, 2017.

<sup>4</sup> Le Tran Huy Phu (2004), Psychiatrists defend homosexual "disease", <http://www.talawas.org/talaDB/showFile.php?res=2764&rb=0503>, September 6, 2004.

that lead to disadvantages for them. However, if considering that for the requirement to be public and socially recognized, this requirement of homosexuals does not affect or threaten any common legitimate interests at all. The recognition of this right by an individual does not affect the rights and interests of others and does not affect social order or safety. This also has a positive effect on resolving family conflicts, reducing social stigma, and creating a legal basis to solve some problems in reality currently<sup>5</sup>.

### 3. The current legal situation of homosexual rights and same-sex marriage in Vietnam

The current situation of legal regulations on homosexual rights in Vietnam

International law has a lot of recommendations related to homosexuals, bisexuals, and transgender people and their rights, which emphasize equality and non-discrimination towards homosexuals, bisexuals, and transgender people. On a global scale, reality reveals that there is not a unified perception of homosexuality and homosexual rights due to many different barriers (traditions, culture, characteristics of the legal system, etc.). However, one thing can also be noticed: the trend to recognize and protect the homosexual, bisexual, and transgender communities has grown quite strongly. In the world, the homosexual, bisexual, and transgender community is very interested in many different aspects (social, legal, medical, labor, economic, etc.). Although stigma and discrimination against the homosexual, bisexual, and transgender community persist, the movement to protect this group has shifted in a positive direction in recent years. This is clearly shown through the process of legalizing the rights of homosexual, bisexual, and transgender people.

According to Vietnamese law, homosexuals basically have the same rights as other members of society. The law has not yet recognized a number of rights related to homosexuals, such as marriage rights for same-sex couples, joint adoption rights for same-sex couples, etc.

The right to equality—no discrimination in political, civil, economic, cultural, and social life—is defined by the basic needs and interests (spiritual and material) of mankind that exist in each person<sup>6</sup>. Vietnam's Constitution and laws do not have separate provisions on equal rights and non-discrimination rights based on issues of sexual orientation and gender identity. Regulations on this right are often prescribed for all subjects in society. The Constitution of the Socialist Republic of Vietnam promulgated in 2013 stipulates that everyone is equal before the law and no one is discriminated against in political, civil, economic, cultural, or social life (Article 16). Thus, according to the current Constitution, the right to equality before the law, without discrimination, applies to everyone (including homosexuals).

In specific areas, the law also provides for this general, non-discriminatory right. Example:

Firstly, in the field of civil law, the 2015 Civil Code recognizes the following principles: "All individuals and legal entities are equal and must not use any reason to discriminate; equal protection of personal and property rights by law" (Clause 1, Article 3). From the perspective of homosexuals, this law is protecting their rights. Furthermore, a number of other rights recognized in the 2015 Civil Code are intended to protect homosexual rights, including: the right to life (Article 33), the right to safety of life, health, and body (Article 34), the right to private life and personal secrets, family secrets (Article 38), and the right to sex reassignment (Article 36)<sup>7</sup>. Although these regulations do not contain sufficient legal basis to protect the rights of homosexuals, the 2015 Civil Code does not contain any restrictions or prohibitions on homosexuals.

Secondly, in the field of labor law, the 2013 Constitution stipulates that wage-earners are guaranteed fair and safe working conditions; are entitled to a salary and a rest regime; are prohibited from discrimination and forced labor (clauses 2 and 3, Article 35); the State protects the legitimate rights and interests of employees and employers and creates conditions for building progressive, harmonious, and stable labor relations (clause 2, Article 57). It can be seen that if the Constitution of 2013 generally stipulates that "discrimination is strictly prohibited", the Labor Code of 2019 stipulates that it "strictly prohibits acts of discrimination on gender, ethnicity, ...". Thus, the provisions of the Labor Code in 2019 have not covered all homosexuals because if it comes to gender, it is about male and female issues, while homosexual objects are related to issues of sexual orientation and gender

<sup>5</sup>Doan Thi Ngoc Hai. The right to change gender according to the provisions of Vietnamese civil law. Url: <https://moj.gov.vn/qt/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=2325>.

<sup>6</sup> Vo Khanh Vinh (Editor) (2009), Human Rights: Multidisciplinary and interdisciplinary approach to social sciences, Social Science Publishing House, Hanoi, 2009, p.18.

<sup>7</sup> Truong Hong Quang, The rights of homosexual, bisexual, transgender and intersex people under current Vietnamese law, Doctor of Law Thesis, Hanoi. 2019, p. 79.

identity (they may be male or female, but their sexual orientation or gender identity may be different).

Thirdly, the Vietnamese law has a number of rules about how to punish administrative violations. These rules are meant to protect homosexuals from being treated unfairly.

In general, the law on equal rights and non-discrimination in political, civil, economic, cultural, and social life in Vietnam is now universally applied to everyone in society. There are also some provisions that directly address the equal, non-discriminatory rights of homosexuals. However, the factors of sexual orientation and gender identity have not been mentioned directly in the law on this right. Just "prohibiting acts of gender discrimination" is not really complete. It can be seen that Vietnam still lacks a common law on anti-discrimination to define general and basic principles for the legal system on equal rights and no discrimination in political, civil, economic, cultural, and social life.

Fourthly, rights in the field of currently criminal justice, the 2015 Penal Code (amended and supplemented in 2017) has quite positive amendments; for example, it stipulates: "Those who use force, threaten to use force, take advantage of the victim's defenseless state, or other tricks to have intercourse or perform other sexual acts against the victim's will, shall be subject to imprisonment from 2 to 7 years" (Clause 1, Article 141 on the crime of rape). The element of "performing another sexual act" can be understood to include oral, anal, or even sex with someone of the same sex. With these new provisions, the 2015 Penal Code (amended and supplemented in 2017) can overcome a number of limitations related to the following issues: "rape" and "lust" of the same sex (especially many male victims are often traumatized after being raped or lewd).

In addition, the law on custody, temporary detention, criminal proceedings, and the execution of criminal judgments has a number of rules about gay and transgender people. When carrying out certain investigative activities or preventive measures in criminal proceedings as well as in criminal judgment execution, there are a number of coercive measures that, when implemented, should be based on the gender of the subject, such as searches of people, custody and temporary detention in criminal proceedings, execution of prison sentences with a definite term, and life imprisonment in criminal proceedings. For custody and temporary detention measures, Point A, Clause 4, Article 18 of the 2015 Law on Enforcement of Custody and Temporary Detention stipulates that if homosexual or transgender people are held in custody or temporary detention, they may be detained in separate rooms. This is a rare law that mentions the term "homosexual" or transgender. This regulation contributes to ensuring that these subjects avoid discrimination from others when being held in custody or temporary detention.

#### **The current situation of Vietnamese legal regulations on same-sex marriage**

Same-sex marriage is known as a marriage relationship between two people of the same biological sex, which can be understood as a marriage relationship between two people who are both male and female. People of the same sex also wish, like normal people, to live in a family with the person they love and be cared for, thus leading to marriage between people of the same sex. However, current Vietnamese law only recognizes monogamous marriages between a man and a woman. Although marriage between people of the same sex is not banned, the state still does not recognize it.

Regarding the right to marriage, current law only recognizes the right to marry between two people of the opposite sex. This is reflected in Clauses 1, 5, Article 3, and Clause 2 of Article 8 of the Law on Marriage and Family in 2014. Accordingly, marriage is when a man and a woman establish a husband-and-wife relationship with each other, and the state does not recognize marriage between people of the same sex. There are some problems with these regulations, as follows:

First, the provisions of the Law on Marriage and Family in 2014 are likely to exceed the limit on the right to get married in the 2013 Constitution: "Men and women have the right to marry or divorce. Marriage is based on the voluntary, progressive, monogamous, equal principle, and mutual respect between husband and wife". In fact, this provision of the Constitution does not explicitly prohibit same-sex marriage. "Wife" and "husband" are two legal terms that refer to the family relationship between two individuals. Regarding biological sex, two people of the same sex can be completely identified as male or female. The 2013 Constitution does not require men to marry only women or vice versa.

Second, the appropriate state agency will not handle a marriage registration request from two people of the same sex. Before the Law on Marriage and Family was passed in 2000, it was easy for the "prohibition" rule on marriage between people of the same sex (Clause 5, Article 10) to make people think less of homosexuals. Currently, the Law on Marriage and Family in 2014 removed this provision, and instead, it "does not recognize marriage between people of the same sex" (Clause 2, Article 8). Although the nature of these two regulations is not different, they also have a conscious impact on society, contributing to reducing the stigma towards homosexuals. In the process of developing the Law on Marriage and Family in 2014, the issue of marriage rights for same-sex couples has been



discussed and taken very seriously, receiving many contributions, shares, and comments from different target groups. This is one of the controversial issues that received much attention when formulating this law. In that context, the Law on Marriage and Family in 2014 has not yet recognized the right to marry or another legal form for same-sex cohabitation.

Third, in relation to other provisions of the Law on Marriage and Family 2014, the regulation that does not recognize same-sex marriage also reveals certain shortcomings. In this law, Article 2 stipulates the "voluntary, progressive, monogamous, equal principle" (Clause 1); Article 5 prohibits acts of sham marriage and sham divorce; child marriage, forced marriage, cheating on marriage, and obstructing marriage (Points a, b, Clause 2). Previously, Article 4 of the Law on Marriage and Family in 2000 had similar provisions. The question is, if a homosexual or transgender person has a homosexual orientation and, because of family pressure or society pressure, they accept marriage with a person of the opposite sex, will that violate the voluntary, progressive marriage principle?<sup>8</sup> This is a very basic principle of marriage and family life in our country and is also a necessary condition to ensure the happiness and sustainability of the family. However, determining what is a voluntary marriage is not simple in reality. Affection is a sacred element, but it is invisible and cannot be quantified in legal regulations or in practice. If that person marries a person of the opposite sex due to the common perception of current society, then that marriage is certainly forced by the family, surrounding society, or other factors, so the marriage does not meet the voluntary principle. Furthermore, if the spouse who is married to that person does not know the truth about his or her sexual orientation, the condition of prohibiting sham marriage will be violated. The right to pursue happiness is one of the basic human rights, including for homosexuals. With these constraints, the law requires certain changes to ensure its value in society.

Regarding the rights of children, a same-sex couple is not entitled to joint adoption (according to the Law on Adoption in 2010 and relevant legal documents). However, same-sex couples can adopt their own children. A lesbian woman can give birth by scientific method (single mother), but a gay man does not have this right (implementation of Decree No. 10/2015/ND-CP dated January 28, 2015 of the government on childbirth by in vitro fertilization and conditions for surrogacy for humanitarian purposes). The right to surrogacy (using a surrogate mother) currently applies only to heterosexual couples (Article 95 of the Law on Marriage and Family in 2014). These limitations mainly stem from the fact that Vietnamese law has not recognized the right to marry or another legal form for the cohabitation relationship of same-sex couples.

### Some recommendations

Vietnamese culture is becoming more like the rest of the world's modern culture, so the author thinks that people's views on homosexuals will improve over time. From there, our society and legal system will slowly take on new values. Legislators also need to look at all issues from a more active, comprehensive, and humane perspective in acknowledging new factors in the development of human rights legislation. This will contribute to ensuring the social value of the law.

In Vietnam, same-sex marriage is influenced by many cultural, political, and social influences. In a social context in which people are still heavily influenced by ancient feudal ideas about the concept of marriage, same-sex marriage is still subject to many social stigmas. Therefore, Vietnam needs to consider following an appropriate process to avoid controversy and social insecurity and, at the same time, help people better understand same-sex marriage and gradually sympathize with homosexuals, perfecting the law in accordance with world humanistic values. The current disapproval of same-sex marriage depends on social prejudices, traditions, and political ideology. However, with the current era of integration and the media, such as newspapers and game shows, people increasingly have a more objective view, and more and more people sympathize with same-sex marriage. Therefore, it is not possible to constantly invoke social factors to limit, not regulate, because society is always changing. Currently, people in same-sex marriage relationships also want to live a legally recognized married life in order to exercise their rights and protect their rights. Therefore, the author proposes some solutions as follows:

First, same-sex marriage should be recognized. The right to marriage is a human right, and human rights are recognized by Vietnamese law as well as international law. A failure to recognize same-sex marriage would be contrary to the principle of voluntary marriage; marriage is a right, not an

<sup>8</sup> Legal Department - Government Office (2012), Report No. 9734/PL dated November 28, 2012 on the survey results of the interdisciplinary mission on the Civil Code project and the Marriage and Family Law project, Hanoi, p. 11,12.

obligation. The same-sex marriage relationship already exists. Therefore, it is necessary to have an adjustment law to regulate that relationship in society according to the legal framework, as well as to be able to perform well the management of the state, in order to resolve these marital conflicts in the best and most objective way possible. Currently, marriage is basically a combination between two people of the opposite sex. Therefore, the concept of marriage is often only associated with heterosexual people. Normally, the recognition of an equal marriage relationship between same-sex couples is not always favorable because of barriers from tradition, culture, religion, politics, parties, policies... The failure to recognize a legal form for relationships between two people of the same sex can also lead to certain legal consequences (property relations, relationships arising from living together, etc.).

Second, consider recognizing some rights related to same-sex couples. These are the rights of children (childbirth according to the scientific method for same-sex couples, the right to joint adoption, the right to represent each other, etc.). These are issues that arise even when same-sex couples have or have not been recorded in a cohabitation relationship. The issue of children from same-sex couples is also controversial. Some argue that the fact that a child grows up under the care of a same-sex couple will affect the child's psychology and lifestyle. However, this is not true because, before the recognition of same-sex marriage, many countries conducted studies comparing the developmental outcomes of children in traditional marriage families and other family types<sup>9</sup>.

Third, it is necessary to change the regulation of "*not recognizing marriage between people of the same sex*"<sup>10</sup>. This is a qualitative, unclear regulation. With this provision, the law inadvertently pushed same-sex marriage out of the law. It will be more difficult to deal with the consequences of same-sex marriage. The law does not prohibit it; thus, in fact, there will be a same-sex marriage relationship in which they live together as husband and wife. However, when a dispute occurs, it will be handled according to the Civil Code, and there is no appropriate regulation, leading to many consequences such as personal identity, children, property.

## CONCLUSION

Gender, gender equality, marriage, and family have all evolved in the modern world. Accordingly, the concept of gender and gender equality is not only limited to the relationship between men and women but has been expanded to include an equal relationship between sexual orientations and gender identity (for example, between gay men and heterosexual men). Marriage and family are now not simply a combination of heterosexual couples but can be families of people of the same sex. The reproductive function is the main function of marriage, but it cannot be the function that determines the formation of a marriage and family relationship. New types of families have been recognized by the United Nations, which encourages countries to protect them. In addition, the issue of homosexuality demonstrates sexual diversity and gender identity in modern social life. When society develops a new level of awareness, the distinction between homosexual, transgender, and heterosexual people is no longer important.


Currently, Vietnamese law still does not recognize marriage between people of the same sex; instead of "forbidden" as before, it only stipulates "not recognizing same-sex marriage," which can be considered a great step forward in the Vietnamese legislative branch when regulating this relationship. In the future, the legalization of same-sex marriage should be carried out in parallel with assessing its impacts and raising awareness so that society understands and accepts it. We must be flexible to adapt to the daily changes of society, need to develop synchronously in all aspects of economy, society, culture, and education, and develop our thinking. Society will accept marriage between people of the same sex only if it is recognized by legislation's pioneering. The last important thing is that marriage between people of the same sex needs to be accepted, the law must ensure equality as well as the rights of all citizens, and Vietnamese law needs to recognize same-sex marriage.

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<sup>9</sup> Nguyen Thi Thu Nam, "Same-sex marriage, world trends and experiences for Vietnam", Journal of Democracy and Law (Ministry of Justice), Special issue of Amending and Supplementing the Law on Marriage and Family in 2000, 2013, p. 164.

<sup>10</sup> Clause 2, Article 8 of the Law on Marriage and Family in 2014.

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