



SAME-SEX MARRIAGE FROM THE PERSPECTIVE OF INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE IN VIETNAM

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ABSTRACT

Same-sex marriage is a controversial issue between supporters and opponents, it even causes profound social divisions. The right to marry is considered a sacred right in each life. By this right, a family will be formed and linked with affection and sharing among family members. Therefore, protecting the right to marry of same-sex people will ensure the social value of the law, towards fairness - a noble goal of the law. More and more countries and territories around the world recognize same-sex marriage or other forms of registered coupling. This is a progressive trend that meets the needs and guarantees the rights of homosexuals. Moreover, the recognition of same-sex marriage also has positive effects on the family and society as shown by various scientific studies around the world. Vietnam is one of the countries taking relative late actions to build the rights for gay, bisexual, transgender (LGBT) people in general and LGBT right to marry in particular. The lack of regulations on the recognition of same-sex marriage has obviously led to many significant difficulties faced by LGBT people. Within the scope of this article, based on the analysis of same-sex marriage from the perspective of human rights, the author indicates the current situation of same-sex marriage in Vietnam, surveys and evaluates the difficulties of recognition of same-sex marriage, and thereby proposes some solutions to recognize and ensure the right to marry of LGBT people in Vietnam.

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1. Introduction

Human rights are the inherent needs, natural and objective interests of humans that are recognized and protected in national laws and international legal agreements. One of the characteristics of human rights is that they are universal. Thereby, human rights are innate and inherent to humans and are applied equally to all members in society without distinction of race, ethnicity, gender, religion, age, background, etc. LGPT people are entitled to all human rights, including the right to marry, due to the following reasons:

First of all, the right to same-sex marriage is a human right derived from the principle of non-discrimination and equality. Non-discrimination, one of the fundamental principles of human

rights, is mentioned in various international documents, such as UDHR, ICCPR, ICESCR. The principle of non-discrimination was first recognized by UDHR. Specifically, it is affirmed by Article 1 of UDHR that “All human beings are born free and equal in dignity and rights”; by Article 2 of UDHR that “Everyone is entitled to all rights and freedoms [...] without discrimination of any kind, such as to race, color, sex, language, religion, political or other opinions, national or social origin, property, birth or any other status”.

Non-discrimination is reconfirmed and concretized in Article 2 of ICCPR and Article 2 of ICESCR, thereby, member states commit to respect and guarantee the rights mentioned in ICCPR and ICESCR to all persons within their territories and jurisdictions without distinction of

any kind as to race, color, sex, language, religion, political or other opinions, national or social origin, property, birth, or other status.

UDHR, ICCPR, and ICESCR include the lists of prohibited grounds of discrimination in their articles of non-discrimination. Although these lists do not explicitly refer to “Sexual orientation” or “Gender identity”, they all conclude with the phrase “other status”. The use of the phrase “other status” indicates that these lists are open-ended and illustrative¹. This means that the grounds for discrimination have not yet been enumerated. In other words, the grounds for discrimination including sexual orientation and gender identity have not been explicitly listed. In General Comment No. 20, paragraph 32, United Nations Commission on Economic, Cultural and Social Rights asserts that the guarantee of non-discrimination in ICESCR includes sexual orientation as “other status” mentioned in Article 2, paragraph 2 includes sexual orientations. States must ensure that the sexual orientation of individuals is not an obstacle to their exercise of the rights mentioned in the Covenant (...). In addition, gender identity is recognized as one of the prohibited grounds of discrimination. For example, people who are transgender, transgender or intersex often face serious human rights violations, such as harassment at schools or workplaces”.

Along with non-discrimination, equality is also a fundamental principle of human rights. Article 7 of UDHR stipulates that “everyone is equal before the law and is equally protected by the law without distinction of any kind [...]”. ICCPR reaffirms this principle in Article 26 by stating: “In this regard, the law prohibits all discriminations and guarantees to everyone equal and effective protection against discrimination on the ground of race, color, sex, language, religion, political or other opinions, national or social origin, property, birth or other status”. Based on two fundamental principles of “non-discrimination” and “equality” in international Human Rights Law, it can be confirmed that everyone of all different sexual orientations and gender identities is qualified human being before the law and full human rights in all areas of life, including the right to marry, to find a family, to raise children, and to adopt children.

The rights to marry, to find a family, and marriage equality are first mentioned in Article 16 of UDHR. Accordingly, men and women of full age have the right to marry and found a family without any restriction of race, nationality, or religion. In addition, Clause 3, Article 16 affirms that “the family is the natural and fundamental cell of society, protected by the state and society”. These provisions of UDHR are subsequently reaffirmed and concretized in Article 23 of ICCPR and Article 10 of ICESCR. According to the Commission on Human Rights, “the concept of family can differ in several respects and vary by country, even by religion, and therefore it is not possible to give a universal standard definition”² Moreover, according to United Nations Committee on the Rights of the Child, a family should also be considered in light of “different family structures, arising from diverse cultural patterns and family relationships that are being formed in society”. Therefore, to study the right to adopt children, it is essential to study the right to marry and found a family based on the differences in the right to marry and found a family.

As a core human value, human right is sacred right recognized and protected by legal documents. As defined by Office of the United Nations High Commissioner, human rights are universal legal guarantees protecting individuals and groups against actions or omissions that compromise human dignity, basic human freedoms. To fully implement the commitments of the Declaration in general and human rights in particular, the 1948 Universal Declaration of Human Rights indicates a general conception of freedom and human rights. Article 1 of the Declaration stipulates: “All people are born free and equal in dignity and rights”, which means everyone is equal in terms of rights regardless of class, status, race, and gender. Despite their genders, everyone has the right to pursue happiness, to marry the person they love voluntarily, freely, equally, and legally. This human right is also stipulated in Clause 1, Article 16: “Everyone has the right to marry, regardless of their sexual orientation and gender identity”.

Additionally, in June 2011, the United Nations Human Rights Council adopted a resolution affirming that “everyone has equal

¹ Born Free and Equal – Sexual Orientation and Gender Identity, Office of the United Nations High Commissioner for Human Rights, 2012, pg. 45

² General Comment No. 19: Protection of the Family, Marriage Rights and Equality of Spouses, Human Rights Commission, United Nations Instrument. HRI/GEN/1/Rev.2 (1990).

rights, regardless of sexual orientation". On March 7, 2012, United Nations Secretary-General Ban Ki-Moon gave a historic speech calling on countries around the world to decriminalize homosexuality, end discrimination against people from LGBT people. Thus, for the first time, the head of the largest international organization on the planet gives a clear message to support people of LGBT people. This is also the notion of the United Nations witnessed by their recent moves to address the issue of discrimination based on sexual orientation and gender identity.

As of 2020, 29 among 220 countries and territories in the world officially recognize same-sex marriage. National policies on same-sex marriage rights vary significantly by states. According to Human Rights Campaign, the recognition of same-sex marriage in countries around the world shall include the following 4 trends:

First trend: Same-sex marriage is legal in 20 countries, such as the US, Canada, Belgium, Brazil, Portugal, Spain, etc.

Second trend: Same-sex marriage is legal in several jurisdictions of 2 countries that are Mexico (Chihuahua, Coahuila, Guerrero, Jalisco, Nayarit, Mexico City, and Quintana Roo), and the United Kingdom (England, Scotland, Wales, and the Pitcairn Islands) in which their countries/territories are included.

Third trend: Same-sex marriage will be considered a criminal offense in 75 countries around the world, including Algeria, Angola, Botswana, Burundi, Cameroon, Afghanistan, Bangladesh, Bhutan, Brunei, India, etc.

Fourth trend: Same-sex marriage will be punishable by death in 10 countries, including Mauritania, Sudan, some parts of Nigeria and Somalia, Brunei, Iran, Qatar, Saudi Arabia, United Arab Emirates, and Yemen³.

Many countries recognize same-sex marriage that is considered a trend in many countries around the world, such as the United States, Spain, Portugal, etc. Same-sex marriage is first recognized and legalized in the Netherlands in 2001 and in Belgium in 2003. Many other countries recognize that same-sex marriage includes other rights and obligations like other marriages of common people, such as divorce, adoption, etc. Many countries have enacted laws

to recognize same-sex couples in various degrees and forms, towards "marriage equality".⁴

In Vietnam today, it is increasingly common for two people of the same sex to found a relationship and "living together as husband and wife". As reported by the Vietnam Institute for Social, Economic, and Environmental Research (2019), compared to the survey results in 2013, the percentage of same-sex couples in a love relationship living together in the period from 2013 to 2019 has increased many times. Specifically, in 2013, about 15% of same-sex couples were living together, in 2019, this percentage increased to 26.8%. There are many reasons for same-sex couples to decide to "live together as husband and wife, for example: (i) family aspect (mostly recognized and supported by parents); (ii) social aspect (society has a more open and sympathetic view to same-sex marriage than before), or; (iii) government aspect (Law on Marriage and Family 2014 no longer prohibits marriage "between people of the same sex"); and more importantly, the reasons come from the same-sex people themselves (love, long-term living plan, financial contribution when living together). Whatever the reason, the need for same-sex people to live together in Vietnam does present in modern society.

2. Methodologies

The article uses the methods of statistics and describing reality to show the marriage situation of LGBT people in Vietnam through data, figures from Reports of Ministry of Health of Vietnam. Through the analytical method, the article analyzes the content of the current Vietnamese legal regulations in association with the actual needs and marriage situation of LGBT people to assess the suitability and responsiveness of current Vietnamese laws related to LGBT people's right to marry in Vietnam. The comparative method is used in some parts of the article to compare the laws of different countries, such as Ireland, Japan, in order to assess the trend of recognition of LGBT people's right to marry in the world and Vietnam.

3. Study results

The practice and laws on same-sex marriage in Vietnam are in line with international

³ Human Rights Campaign, International Policies on Same-Sex Marriage, <https://www.infoplease.com/us/gender-sexuality/international-policies-same-sex-marriage>, retrieved on February 6th, 2022.

⁴ See more Hoang Thao Anh (2020), The concept of marriage equality in Taiwan from a legal historical perspective, *Northeast Asian Studies Journal*, No. 7 (233) 7-2020.

commitments to which Vietnam is a member; Vietnamese law recognizes the principle of non-discrimination and equality before the law. Article 16 of Constitution of Socialist Republic of Vietnam in 2013 (“Constitution 2013”) states: “Everyone is equal before the law. No one should be subject to discriminatory treatment in political, civil, economic, cultural or social life”. Through our review, we did not find any specific provision on rights or right restrictions applied exclusively to gender and sexuality diversity in Vietnam. While the Vietnamese Civil Code does not stipulate the right to found a family, Law on Marriage and Family defines family as “a collection of people bound together by the ties of marriage, blood relation or nurturing relationship”⁵. By this definition, there are three ways to form a family relationship: (i) marriage; (ii) blood relationship (birth of children); (iii) nurturing relationship (adoption).

Regarding marriage, current Vietnamese law does not recognize marriage between same-sex people. According to Law on Gender Equality, sex is understood as the biological differences between men and women. Sex is also mandatory information to be shown on people's identity cards (ID card) as to compliance with the regulations on ID cards or citizen identification. Legal regulations seem to assimilate sex with gender that is understood as the differences in roles and social relationships between men and women⁶. It is obvious that the laws only care about the sex recorded on the identification papers of the individuals who register for marriage rather than consider the factors of sexual orientation or gender identity of those individuals. In other words, people with gender and sexuality diversity can still apply for marriage registration as long as the genders printed in the identification papers of the couple are different. Law on Marriage and Family 2014 marked a change in legal policy on same-sex marriage in Vietnamese legal system when the Law on Marriage and Family repealed the provision on banning marriage between same-sex people and replace it with the direction in which “the State does not recognize same-sex marriage” in Clause 2, Article 8 of Law on Marriage and Family 2014. This is understood that same-sex marriage is not recognized as a legal marriage in Vietnam, marriage is not allowed to be registered at the competent authority; Although the regime on the

property and personal identity will not be governed by Law on Marriage and Family 2014, they shall be governed by Civil Code 2015 and related legal documents. Furthermore, as the law no longer stipulates the penalties for same-sex marriage, same-sex couples have opportunities to satisfy their desire to hold a wedding and live together even though their “marital relationship” is not legally recognized. This regulation is a new step forward in the legal policy on marriage and family for marriage between same-sex people; thereby contributing to reducing social discrimination and ensuring the right to pursue happiness for LGBT people.

4. Discussion

An overview of the development of Vietnamese legal regulations on same-sex marriage indicates that: The law has a more open perspective through amending certain provisions on same-sex marriage relationships – that is considered “different” and contrary to the traditional culture of East Asians where marriage is defined as the establishment of a husband-and-wife relationship between a man and a woman. This change is in line with the trend of international law as same-sex marriage has been legally recognized in many countries. Law on Marriage and Family 2014 does not recognize same-sex marriage to ensure compliance with the 2013 Constitution which affirms the right to marry between male and female without a definition of marriage by sex and any provision on same-sex marriage. Law on Marriage and Family 2014 does not recognize same-sex marriage, therefore the right to adopt children of same-sex people is also not recognized by Vietnamese law. It is stated in Clause 3, Article 8 of the Law on Adoption 2010 that “A person can only be adopted by a single person or by husband and wife”. The current law obviously does not recognize same-sex marriage and therefore, the related rights and obligations of same-sex couples are not regulated by the law.

4.1. Barriers to the recognition of same-sex marriage in Vietnam:

About 34 countries and territories in the world legalize same-sex marriage, including: Andorra, Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Denmark, Ecuador, Finland, France, Germany,

⁵ Law on Marriage and Family, Article 8, Clause 10

⁶ UNAIDS Terminology Guidelines

Iceland, Ireland, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, United Kingdom, United States, and Uruguay. Nevertheless, in Vietnam, there are many different views on same-sex marriage. The factors, such as culture, tradition, and Asian thought, have a great influence on the viewpoints of homosexuality and same-sex marriage in Vietnam. Same-sex marriage in Asia is much more "conservative" than in Europe and America. For same-sex couples, the major problem is not whether they can legally marry, but whether they have the right to live without persecution. In some Asian Muslim countries, homosexuality is not only illegal, but also guilty and subjected to punishment. In Malaysia, LGBT people are beaten by law, and must spend 20 years in prison. In Indonesia, two-fifths of regions using the Koran consider LGBT people as criminals. Even in Singapore, a developed country, homosexuality is still considered illegal. In some other countries, such as Japan and China, homosexuality are not considered illegal, but same-sex marriage is not accepted. In Vietnam, same-sex marriage is considered in relation to human rights, humanity to reduce social stigma and create a basis for resolving legal consequences that is the legalization of same-sex marriage. Nevertheless, on an opposite viewpoint, same-sex marriage is said to be inconsistent with Vietnamese family traditions and customs, incompatible with biological law, and unable to guarantee family function in maintaining lineage. Obviously, the concept of homosexuality as well as same-sex marriage has not changed significantly in Vietnamese society⁷. Vietnamese culture today still has prejudices on same-sex marriage. It is still concerned that recognition of same-sex marriage shall go against traditional values on marriage, distort the views of young people, and that same-sex marriage shall affect the care for children's development. The issues from culture and tradition will be big obstacles to the process of recognizing same-sex marriage in Vietnam.

Vietnamese law has not guaranteed the ability of same-sex people to exercise their rights to marry. Law on Marriage and Family 2014 stipulates that "The State does not recognize marriage between same-sex people" (Article 8).

The change from "ban" to "not recognize" shows a progress and mindset change of Vietnamese legislators in approaching the regulations on recognition of same-sex marriage. However, "not recognize" still shows that the state does not encourage the development of same-sex marriage, at least in the following years. Moreover, the participation of LGBT people in the law-making process is still limited, the process also does not attract the participation of LGBT people, especially in the right to marry. We have not consulted and surveyed the opinions of LGBT people to have an appropriate approach for making and implementing our laws. This has unconsciously affected the rights and interests of same-sex people, especially when these couples break up and the disputes over identity and property occur.

4.2. Solutions to complete the law on same-sex marriage in Vietnam:

In Vietnam today, there are about 1.65 million LGBT people aged 15-59, accounting for 3-5% of the population. LGBT people in Vietnamese society absolutely deserve respect and equal treatment in all aspects, including marriage. Therefore, the process of formulating and recognizing the right to same-sex marriage is essential. Vietnam needs to develop a roadmap to recognize same-sex marriage and provide specific guidelines on same-sex marriage for the following reasons:

First, the recognition of same-sex marriage will guarantee one of the most basic human rights - the right to happiness. In the material aspect, all human efforts to work and study are to ensure a free and prosperous life, it is material happiness. In the spiritual aspect, people are happy when their emotional life is fulfilled, including love with their partners, regardless of love between a man and a woman or between LGBT people who only feel happy to love and be loved with their true sex because homosexual is merely a natural and normal variation in human sexuality. Therefore, same-sex couples should be entitled to equal recognition of marriage in order to enjoy happiness in love just like other people.

Second, the recognition of same-sex marriage will ensure the "internalization" of international human rights agreements in Vietnamese legal system. Until now, Vietnam has joined many

⁷ Truong Hong Quang, "Awareness of homosexuals and gay rights", *Journal of the State and Law* (Institute of State and Law), March 2012 issue, pp.25-34, 44

international human rights agreements, such as Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights 1966, all affirm that everyone is equal in political, economic, cultural and social rights without discrimination on the grounds of race, color, and sexual orientation, gender identity. This is a very important basis for the recognition of same-sex marriage by the member states including Vietnam.

Third, in the social aspect, the recognition of same-sex marriage will help same-sex couples be accepted by family and society, thereby helping them to have an active life and contribute more to society, limiting negative behaviors for society, such as prostitution and violence between same-sex couples living together.

Furthermore, it is necessary to legally recognize the marriage of foreign same-sex couples living and working in Vietnam (these couples have registered their marriage in a country that recognizes same-sex marriage). This helps the couples to feel secure and legally safe when living, working and dedicating in Vietnam. Korea does not recognize same-sex marriage, but in October 2019, the Korean Government announced the recognition of same-sex spouses of foreign diplomats in Korea as legal spouses under Korean law⁸. This is the practice that Vietnam should refer to in the process of developing a law regulating same-sex marriage.

Facing the barriers in the recognition of same-sex marriage in Vietnam as analyzed, the author proposes the following solutions:

First, in the process of developing legislation on the right to marry between same-sex people, it is necessary to apply human-rights-based approach (HRBA). Accordingly, the process of law formulation and implementation needs to put the LGBT people at the center to respect and effectively ensure the exercise of LGBT people's right to marry. The law-making process needs to pay more attention to how LGBT people will be affected if the rights are not recognized instead of just focusing on their unsubstantiated impacts of the recognition on society. In addition, the law-making process needs to ensure more participation of LGBT people for them to

contribute ideas and propose effective law-making plans.

Second, the recognition of same-sex marriage needs to prepare the conditions, support, and consensus of society, including adaptation to life and social conditions. Consensus is important in ensuring that same-sex marriage regulations are developed in a way that is appropriate to living conditions and effectively implemented in society. To achieve these requirements, it is important to change the concept of sex in culture, tradition, and everyday thinking. While the daily life and operation of society are dynamic factors, cultural factors also need to be changed to better fit the requirements of social life. We should not use the cultural factor as a barrier to the development of each individual or the development of the legal system as a whole. Concepts and values of the culture are definitely changeable to adapt to the changes of human life, socio-cultural factors, and integration. Changing our viewpoints on same-sex marriage could be an important tool to promote the dynamic and sociable image of Vietnam in the eyes of the international community. To do this, it is necessary to have changes and influences from state agencies, the media, and social networks to gradually change the way of thinking and mindset about same-sex marriage that has existed for a long time. Giải pháp này Việt Nam có thể cân nhắc nghiên cứu kinh nghiệm của Nhật Bản. Gần đây, Nhật Bản đã ban hành Luật Tăng cường hiểu biết của người dân về đa dạng xu hướng tính dục và bản dạng giới" (gọi tắt là Luật Tăng cường hiểu biết về người chuyển giới) đã được Nghị viên Quốc hội đề xuất và sau đó được thông qua vào ngày 16/6/2023 (Có hiệu lực thi hành từ ngày 23/6/2023). Luật này đã đặt ra một nguyên tắc cơ bản đó là mọi công dân cần được tôn trọng dưới tư cách cá nhân, bất kể xu hướng tính dục hay bản dạng giới của người đó, đồng thời quy định Nhà nước cũng như chính quyền địa phương cần xây dựng các chính sách để tăng cường hiểu biết của công dân về người chuyển giới; chủ doanh nghiệp hay người quản lý các trường học cũng cần nỗ lực để nâng cao hiểu biết về người chuyển giới. To do this, Vietnam should learn from Japanese Law. In 2023, the Law on "Promoting People's Understanding of Diversity in Sexual Orientation

⁸ On October 18, 2019, New Zealand Ambassador to Korea, Philip Turner, who is biologically male, and her husband, Hiroshi Ikeda, greeted President Moon Jae-in and his wife. This is the first time the Blue House has officially invited a same-sex couple to an event for a diplomatic mission in

Korea. Reference link: <https://www.hankookilbo.com/News/Read/201910201790755799>, retrieved on November 13th, 2021.

and Gender Identity" (referred to as the Law on "Promoting Understanding of Transgender People") is proposed by Members of the National Assembly and then enacted on June 16, 2023 (Effective from June 23, 2023). The basic principle of this law is that all citizens should be respected as individuals, regardless of his or her sexual orientation or gender identity; the State and local governments need to develop appropriate policies to increase citizens' understanding of transgender people; business owners and school administrators need to take efforts to improve understanding of transgender people.

Third, the recognition and protection of LGBT people's rights - a category of natural rights, is possible only when it is formalized by law. The regulation of LGBT's people rights by the law shall not only guarantee a solid legal basis to protect the interests of LGBT people but also ensure the compliance of those rights in the whole society. The development of a legal system for the recognition of same-sex marriage could create appropriate grounds to solve the problems arising when LGBT couples live together as a family. Recognition of same-sex marriage through marriage registration could be an appropriate orientation for Vietnam in the near future. A typical example for this orientation is Law on Gender Recognition 2015 of Ireland. According to this law, a person can apply for a Gender Recognition Certificate to have the State recognize the gender they want. When the Gender Recognition Certificate is issued, the gender of the person named on the certificate will be recognized.

A registered cohabitation (civil union) for same-sex couples in Vietnam should be recognized. The process of recognizing same-sex marriage in Vietnam is still a long way to go, therefore recognizing a form of union and living together of same-sex people is an important requirement. The experience of countries around the world indicates that Vietnam can refer to civil union to apply in the near future. The reason is that the lack of a mechanism for recognition leads to many difficulties in resolving and handling disputes and cases related to same-sex marriage. The recognition of such a civil union also requires a different perspective on gender equality and the concept of family. The concepts defined by the law need to be changed, it is not only to link people of the opposite sex but also to include LGBT people.

The recognition of civil union for same-sex couples will open up new prospects for solving problems related to registration of union with foreign elements, determination of marital status, solving the issues related to identity and property when same-sex couples no longer live together.

5. Conclusion

Same-sex marriage is a controversial issue not only in Vietnam but also in many other countries around the world. LGBT people's right to marry is a basic human right, however, for various reasons, the recognition of this right in many countries is still limited. There are many contrasting opinions on whether same-sex marriage should be accepted or not. In Vietnam, national law neither prohibits nor recognizes same-sex marriage. However, in fact, the number of same-sex couples getting married in Vietnam is increasing. Vietnamese society as well as current Vietnamese legal regulations tend to be more and more open, gradually reducing the stigma and discrimination against LGBT people. However, for LGBT people's right to marry to be officially recognized by the law, it requires the great efforts of the Government, especially in raising people's awareness and changing the long discriminatory notion toward LGBT people.

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