

## The issues relating to same-sex marriage legalization in Vietnam

It is generally believed that gender equality is only concerned with the equality between men and women. However, the scope of gender equality is not only confined to opposite sexes but also within sexes, leading to the equality claims for same-sex and opposite-sex marriage. Although same-sex marriage has been regulated through law and customs in many countries globally, it is still controversial in terms of legislation and social responses. Vietnam is no exception. Same-sex weddings are allowed after the amendments to the Vietnamese Law on Marriage and Family in 2014. However, such couples are neither legally recognized nor protected under the law. By analyzing and synthesizing aspects related to the world and Vietnamese society, this article aims to answer a number of questions on the legalization of same-sex Marriage in Vietnam from the perspective of lawmakers: (1) Should this issue be regulated? (2) What angles and scope should be adjusted? (3) What are major challenges in legalizing same-sex Marriage in Vietnam in the near future?

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### 1. Should same-sex marriage be legalized in Vietnam?

Same-sex marriage has been a complicated issue in Vietnam. The legalization of such marriages has come under controversy whether Vietnam should legalize this matter in recent years. Advocates argue that the legalizing same-sex marriage can be considered as an indicator of human rights, gender equality and non-discrimination in society. This is also consistent with the policy ensuring the people's right to mastery in all fields regulated in the highest law of the Socialist Republic of Vietnam is the Constitutional Law in 2013. However, opponents claim that this behaviour is morally incorrect in Eastern culture where only heterosexual marriages are traditionally acceptable. It can also impose adverse impacts on family and social norms and entail a host of other changes in the legal system. In this article, we will not discuss whether the effects of legalising same-sex marriage is good or bad, but approach them objectively as other social issues based on certain evaluation criteria.

#### *1.1. Social pressure*

It can be seen that the law itself does not appear spontaneously, the essence of the law is the expression of state power, appearing when there is a need for society<sup>1</sup>. Law is a form of social existence that is born with its conditions and foundations. In fact, it is the legal matter that drives the law to emerge. We can see the legal matter here is the same-sex marriage. Under the requirements of society, the State will consider whether that legal issue will be recognized in the law or not. It is the legal issue that will lead to the law application. Same-sex marriage is not something that is conceptualized by an entity or a state, it is an impersonal behaviour. The State only assigns legal quality to it due to the requirements of society in order to ensure the benefits of society. It takes a certain time for the government to reflect those matters in the law

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<sup>1</sup> Hanoi Law University, *Textbook on General theory of state and law*, 2020

apart from the urgent ones. An example that can be seen as a legal issue that has arisen recently is the case of the Covid pandemic. The pandemic has seriously affected all aspects of the whole society; therefore, it must be recorded and reflected in a timely manner in the law. However, from legal facts to legal provisions requires a certain process because it involves many different factors, especially the interests of the majority or in other words, the interests of society. It is not possible to include all legal facts that arise in the governing legal system. Only when it simultaneously satisfies the requirements of the State and society can it be considered and applied. Same-sex marriage also "touches" to a certain segment of society, especially not only the LGBT+ community but also other interest groups in society.

### *1.2. Current situation in Vietnam*

In fact, there are currently no official statistics on the size of LGBT population in Vietnam. Based on some unofficial research data, it is possible to estimate some relative numbers. For example, according to research conducted by the NGO CARE in Vietnam, this number ranges between 50,000 and 125,000 people (in 2012), accounting for 0.06% - 0.15% of the population<sup>2</sup>. The current LGBT demographic in Vietnam is actually much larger than the statistics as well as increasing in population. In Vietnam, although the Law on Marriage and Family in 2014 does not prohibit the practice of homosexuality, it does not encourage it either. In the LGBT+ community, there are still marriages that take place and are accepted by two families or one of the two families or even without the consent of the two families. It is not difficult to spot LGBT weddings that have been reported on the media. Some of the couples are famous people. One thing that same-sex couples have in common when they are ready to come out shows is that they are ready to accept conflicting opinions (mostly objections) and take the responsibility to represent the voice of the community: LGBT couples can get married like any other normal heterosexual couples in society. Every year, the LGBT+ community also organizes marches in June to peacefully protest and raise political awareness about current issues facing LGBT+ communities around the world. These activities have sent a powerful message to the State government agencies with the hope that the government will legally recognize them and protect their benefits as heterosexual married couples.<sup>3</sup>

### *1.3. Social consensus*

In general, social attitudes towards same-sex couples are either discriminatory to varying degrees or do not show obvious attitudes such as ignoring or disinterest. Not to mention whether they are willing to accept them to be able to support same-sex marriage. According to research by the NGO CARE, there is a small percentage of people who have an open attitude towards homosexuals and also accept homosexuality. There are even people who have started calling for a more positive attitude towards them. As mentioned above, to be accepted, agreed and supported by society is not a simple matter, it depends on many different factors such as economic, social, cognitive, tradition, culture, etc..., but in essence, only when one can touch the "interest" of oneself and one's family, then the homosexuality will be reflected in accordance with the law. However, in reality today, the issue of when to recognize homosexuality is still quite unfamiliar to the majority of people in Vietnam, especially the large proportion of people living in rural, remote and isolated areas with low income. Under difficult circumstances, issues like these are not a priority for them. Therefore, if the social consensus reaches a certain threshold, then there will be support from many people in society.

### *1.4. International pressure*

Vietnam is one of the active members of international organizations, including the United Nations. Vietnam always adheres to the international treaties that it has signed and acceded to. Along with that, the Vietnamese State always tries to internalize international treaties to further improve the country's legal system, especially to ensure practical benefits for its citizens. In other words, to further enhance human rights in the Constitution and other laws. Under the

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<sup>2</sup> NGO CARE, *Report on LGBT+ in Vietnam*, 2012

<sup>3</sup> CGEP, *Report on Country gender equality profile*, 2021

supervision of international organizations, Vietnam needs to ensure that every citizen is treated fairly, avoiding all discrimination. The 1948 Universal Declaration of Human Rights stipulates that "All human beings are born free and equal in rights and dignity". Everyone here regardless of gender, color, age, language, religion, ... and of course gay people must also enjoy the same rights as other citizens in society. They also deserve the rights recognized by the Constitution and by law. However, from the perspective of a country like Vietnam, the rights of gay people, more specifically their right to marry, are still a sensitive issue. The legalization of this practice depends on the opinion of each country, but in general this is a positive trend and more and more countries are supporting it. The evidence is that there are more than 30 countries and territories around the world that have legalized same-sex marriage in the provisions of national law, which is also a good lesson for Vietnam to learn. For example, the United States legalized homosexuality on June 26, 2015 not only opening a brighter and better future for LGBT+ people in society, but above all, showing itself as one of the pioneer countries in the field of gender equality and improving human rights and democracy in society. In particular, we can see a lot of strong supports of this country's politicians for same-sex marriage. Hilary Clinton said: "Gay people are born into, and belong to, every society in the world. They are all ages, all races, all faiths. They are doctors and teachers, farmers and bankers, soldiers and athletes. And whether we know it or whether we acknowledge it, they are our family, our friends, and our neighbors. Being gay is not a Western invention. It is a human reality". Believing that under pressure from international organizations, member countries, including Vietnam, will be more open as well as help people in the LGBT+ community who are minorities and are also one of the most vulnerable people in society deserve what they have.

In summary, it can be seen that the legal recognition of homosexuality is not overnight but will need many certain factors. However, the early legalization of this issue will help reduce the prejudiced view of the society, less attention towards homosexuals. This also reduces the social problems related to gay people, ensuring the rights of gay people as well as those involved.

## **2. Governing scope of law relating to same-sex marriage**

When taking into account the scope of regulation of the law related to same-sex marriage, its scope is set out to be quite complicated because common sense according to current law is mainly between the two sexes, namely men and women. If we accept the arbitration agreement, we will have to change a series of legal provisions in the legal system to suit the subjects, competence, procedures, etc... Specifically, it can be encapsulated in two contents as follows: Regarding the establishment of the most important relationship in the law is the personal relationship and the property relationship. Personal relations here we can understand as civil legal relations with the object of the personal values of a subject. Each subject will have a lot of personal factors that make up its own characteristics, the difference between that subject and all other subjects in society (specificity, uniqueness)<sup>4</sup>. With so many personal factors, there are personal factors of great value, which need to be protected, recorded separately and recognized as personal values. It is these personal values that form the basis for legislators to recognize and stipulate moral rights for each of those subjects. According to the provisions of Article 8 of the Law on Marriage and Family 2014: "The State does not recognize marriage between persons of the same sex" and Clause 5, Article 3 of this Law also explains that "Marriage is a marriage between a man and a woman and establish husband and wife relationship with each other in accordance with this Law on conditions for marriage and marriage registration". Thus, the Law on Marriage and Family 2014 does not recognize homosexual relationships, but there is no law prohibiting this behavior. This means that they can hold weddings and live together as husband and wife, but are not allowed to register their marriage at a competent State agency. From that, it can be seen that between two gay people, of course, there will be no legal binding because they are not granted marriage registration, are not recognized as a legal husband and wife.

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<sup>4</sup> Hanoi Law University, *Textbook on Civil law (Part 1)*, 2018

Therefore, other relationships such as children, support, rights and obligations of husband and wife... do not exist as well.

Property relationships also exist based on personal relationships. A property relationship is a relationship between a person and another related to property. In this context, we can see that if the marriage contract is not recognized, the issues related to the arising of the property relationship such as common property between husband and wife, the right to inherit property, etc... will be not applied in accordance with the provisions of the Law on Marriage and Family as well as other relevant laws. Thus, when there is a property dispute, it is very difficult to properly resolve it and ensure the interests of the parties or the interests of children adopted by same-sex couples as their own children who are not recognized as parents by law to enjoy the right to inherit property.

To solve the above problem, it is necessary to amend Clause 5, Article 3 of the Law on Marriage and Family 2014 in the direction that marriage which is the act whereby a man and a woman or a man and a man or a woman and a woman establishes a husband and wife relationship according to the provisions of this Law on marriage conditions and marriage registration". This change will not affect the amendment of other relevant regulations such as rights and obligations between husband and wife, between parents and children, etc. If same-sex marriage is recognized by this Law, it will be very favorable. Taking advantage of applying other regulations, that is, handling property relations arising after marriage, adoption, surrogacy for humanitarian purposes, inheritance rights, etc... without needing to readjust the terms which are specified in the Law and only promulgates additional documents guiding the application of a number of articles of this Law. However, such regulation can lead to abruptness and embarrassment for other actors in society, the application may be arbitrary in many places, it is possible to learn from some other countries that are not officially recognized as husband and wife, but the form is similar to such relationship, for example, in the United States, applying the form of "civil union" at the beginning of the recognition of homosexuality in order to gradually expand the rights to same-sex couples, creating more more responsibility between couples such as taxes, property, etc... and enjoy other benefits such as social security, health insurance, etc..., but no matter what, the recognition of homosexual marriage brings new rights and full and complete benefits for same-sex couples.

When it comes to the determination of procedures in the arbitration agreement, the actual law stipulating the content of the recognition of arbitration is not a difficult matter, but determining the order of procedures in the arbitration can be more complicated than that. It means determining the governmental levels to proceed and handle marriage relating gay parents and whether there are any differences between homosexual marriage and heterosexual marriage or not; who is responsible for handling these problems,... From our perspective, the subject with jurisdiction can also apply the same as other normally married heterosexual couples such as communes and wards that can issue a marriage registration certificate if they have all the capacity conditions of civil force on the basis of progressive and voluntary marriage. However, at first, it can lead to confusion for the handlers because it is difficult to determine the rights and obligations of the parties, moreover, they also require different types of paperwork to carry out the activities. Actions such as marriage registration, divorce processing, child adoption, etc. are also a big obstacle when they will have to face state agencies dealing with issues related to their married life. Similarly, for example, in the case of civil status registration, if homosexuality is recognized, there must also be separate regulations related to registration of cohabitation for same-sex couples (registration, cancellation of registration, registration form, registration cancellation form). The registration also needs to be recorded in a separate register with a different registration form than that of male and female couples. In addition, the law also needs to supplement regulations on marriage registration and civil union relations with foreign elements (similar to marriage relations with foreign elements) to ensure the avoidance of conflicts and ensure practical benefits for same-sex couples in legally recognized countries. In addition, the State also needs to organize many training programs to guide the authorities from

central to local levels in handling cases related to same-sex marriage. It can be seen that the problem of regulatory law is not only in the content of regulations on issues of domestic law, but also in the re-establishment of applicable procedures, which takes a lot of time and effort within the State. At the same time, a certain amount of budget must be allocated for legal amendments and other related training programs.

Thus, from the above analysis, it can be seen that the legalization of DV also leads to changes in a series of provisions of different laws. Although this change can be expensive and time-consuming, it represents an improvement in legislative thinking and techniques, and serves as a premise for stability in perfecting the legal system in the future, especially the law on ensuring practical benefits for gay people in Vietnamese society.

### **3. Main obstacles in Vietnamese law's approach to same-sex marriage**

If Vietnam is to legalize same-sex marriage, as mentioned above, it requires going through certain obstacles, including both objective and subjective factors. We are looking at some of the main obstacles as follows:

*Firstly*, cognitive and social obstacles: This can be seen as the greatest barrier that gay people encounter when they want to fight for the legalization of marriage as well as legal recognition. The cuddling behaviors of two men in public still sometimes makes others feel disgusted. Many parents feel hurt, surprised, angry, or bewildered when they know that their child is gay. Some people are looking for a way to change, while other parents do not care about their children anymore. There are even parents who seek to "cure" their children because they think this is a disease, using all methods in order to brainwash and change the sex of their children. There is a real case as follows, the father was "shocked" when he knew that his daughter had just graduated with a master's degree and was dating another girl. Not accepting this fact, he personally mixed sleeping pills into a glass of lemonade for his daughter to drink and then let the man who had pursued her for 3 years "do whatever he likes". He hopes that when "rice has been cooked into rice", he "will be able to separate her from the other girl". As a result, after knowing that her parents facilitated her sleeping with another man, his daughter went crazy and rabid. And since then she has lived as a mute<sup>5</sup>. The press has also repeatedly reported on the suicides of young gay people under pressure from their parents and prejudiced views of people. There was a time when les and gays did not dare to admit themselves to society... It can be seen that there is still a large number of people in Vietnam who are still quite shy, even angry when his children become like that. This is understandable because according to the concept of the people so far, when assessing the role of the family and husband and wife, marriage is to give birth to children, even to give birth to a son to continue the family lineage. In fact, marrying two people of the same sex will tarnish the traditional union of marriage and lose national identity. The recognition of the relationship between people of the same sex in some respects can be said that it comes from a part of young people who have not yet thought carefully, so they have distorted thoughts, considering it a trend. In addition, when accepting homosexual relationships, future generations may misunderstand that marriage is not for the sake of children, but simply for the sake of relationship cohesion and satisfaction of the personal needs of the parties involved in the relationship of marriage. Marriage is to create a family and that family must ensure the nurturing and socializing function of children, but same-sex couples cannot take on this role. We believe that the number of gay people in society as well as when they get married is just a minority in the society and cannot affect the function of each family member. We also do not have a rating scale for this level. Therefore, if time proves it, creating conditions for them to exercise their rights is the only reagent for us to confirm whether homosexuality really affects society in general or not.

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<sup>5</sup> An ninh thu do < <https://anninhthudo.vn/loai-thuoc-nao-cho-nguoi-dong-tinh-post120107.antd>> accessed 28 November 2021

There are many opinions that children living in same-sex families will have negative effects. Many people believe that children are traumatized by lack of parenting because fathers and mothers play different roles in the family. Usually the father educates the children about the direction, career and energy, while the mother is more inclined to nurture the soul and emotions of the child. Regarding families without fathers, a University of Canterbury study conducted by Professor Bruce J. Ellis showed that "the absence of a father is strongly associated with the risk of early sexual intercourse and pregnancy adolescent pregnancy"<sup>6</sup>. This is relevant to the debate surrounding same-sex marriage because, in lesbian couples, children inevitably grow up without their biological father, thereby increasing the risk of unfortunate effects. Australian ethicist Professor Margaret Somerville observes that the need for same-sex marriage "forces us to choose between prioritizing the rights of children or the rights of gay adults"<sup>7</sup>. The deepest human maternal love, these relationships will be abolished by the "marriage" of two men. However, up to now, there has not been any research confirming the negative effects of children of same-sex couples.

*Secondly*, traditional and cultural obstacles: Many people believe that homosexuality is influenced and imported from the West. However, in reality this is not accurate because when we look at it from a cultural and historical perspective, gay people have also appeared, even making great contributions to the country. Explaining this issue is easy to understand when Asian countries, including Vietnam, are heavily influenced by Confucianism and Eastern traditional values. For example, in the Hong Duc Code and the Gia Long Code there is a provision that a husband has the right to divorce his wife if the wife is unable to bear children or the Law on Marriage and Family in 1959 prohibits persons with complete physiological impotence from marrying. Researching the past feudal history, homosexuals who cannot marry or are impotent can be recruited by their families to serve as eunuchs. If they do well, they can brighten their ancestors and lineage. For example, in the case of Ly Thuong Kiet, he was a eunuch of the Ly dynasty but also a prime minister with great merit in defeating the Song army in 1075-1077. He was the first to write the work Nam Quoc Son Ha, which is considered the first declaration of independence in the South. Or like Le Van Duyet, according to historical records, was also a eunuch living in the Nguyen Anh - Gia Long dynasties, having great merit in supporting the King to start the Nguyen Dynasty<sup>8</sup>. They were all famous figures in history, although they did not have children, they still got married and made great contributions to the country and society at that time. It can be seen that getting married and starting a family is just a form of expression and they absolutely have the right to choose. Therefore, also from a historical perspective, homosexuals are still subject to the influence of cultural ideologies ingrained in the subconscious of every citizen. Even homosexuals themselves may not accept themselves because of the stereotypes they have been propagated and embedded in their minds. To change this concept is not an overnight thing, but it requires a gradual change in awareness and understanding, removing old cultural values that are no longer relevant, especially harsh prejudices. for homosexuals and their marriage.

*Thirdly*, lack of experience in legal adjustment. Vietnam is still a young country still in the process of perfecting its legal system. In each set of legal issues, careful calculations are required before they are reflected in legal documents. So far, we have only heard of different types of marriage such as monogamous marriage, polygamous marriage,... but we rarely know about many types of marriage between people of the same sex and historically there is little evidence of this type of marriage. Therefore, getting used to a new legal fact is also a certain obstacle when legislators reflect them into the law. However, at present, there are 30 countries and territories around the world that have recognized homosexual marriage, which is a basis

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<sup>6</sup> Bruce J. Ellis, < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2764264/>> accessed 28 November 2021

<sup>7</sup> Margaret Somerville, < <https://www.abc.net.au/religion/same-sex-marriage-its-about-childrens-rights-not-sexual-orientat/10096462>> accessed 29 November 2021

<sup>8</sup> Eva, < <https://eva.vn/eva-tam/bo-3-thai-giam-day-quyen-luc-ai-ai-cung-phai-kinh-so-trong-lich-su-viet-c66a318156.html>> accessed 29 November 2021

for Vietnam to learn from the experiences of these countries to suit the characteristics of society, Vietnamese customs and traditions. The Netherlands, for example, is the first country to recognize same-sex marriage in the world. They also have extensive experience in assessing relationships between same-sex people from civil unions (in 1998) to legalization of marriage (in 2001). Similarly, the United States has also learned and applied in its federal legal system. Although it is possible to learn from the pioneering countries to recognize this matter, it is not a simple matter for Vietnamese legislators to always apply because it also stems from other characteristics such as the nature of the system laws, characteristics of population, society, tradition, culture, etc.

Moreover, if Vietnam recognizes and legalizes same-sex marriage, in relation to international law is also an issue that needs to be concerned. For instance, when a citizen of a recognized country and a citizen of a non-recognized country get married, how will their legal rights and interests be regulated? Is there recognition in this case or not? If a Vietnamese citizen marries a citizen of a non-recognized country, what will be the rights of the citizens of the two countries? Because when two people live in Vietnam, their marriage will be recognized and treated like other legal couples. They will have the right to pursue marriage, be guaranteed the rights and benefits that human rights deserve. When they have a dispute in the marriage relationship, it will be adjusted and resolved by the law in Vietnam. However, when two people in the country have not raised the issue of recognition, their marriage rights in particular and human rights in general will not be guaranteed, their marriage relationship will not be recognized. But marriage is a natural right that any citizen is entitled to, so in this case, is human rights still upheld and considered as an "absolute" right? Therefore, if same-sex marriage is instituted and legalized, it also requires the member states to have a common mechanism, applying certain principles to be applied between countries that have recognized this marriage and countries are still "tough" against this behavior.

Thus, from the analysis of the above-mentioned obstacles, it can be seen that there are many factors that influence whether it is possible to overcome these barriers to legalize homosexual marriage in Vietnam. However, in general, law is a choice, whether or not the legalization of homosexuality is possible, the above obstacles are just forms of expression, an excuse for the justification of the benefits, which can affect the society and the State. It is only when it reaches a certain threshold and balance that the legalization of homosexuality will soon be provided for in the law. It is our firm belief that, in any society, there are differences, and these persons, the LGBT+ community, are also the ones who will account for a certain proportion and have a stable nature. Therefore, we reckon that in the near future, when all the necessary factors are gathered, same-sex marriage will be officially recognized by society and the law./.