

The Ensuring Conditions of LGBT Right to Adopt in Vietnam: Inadequacies and Recommendations

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Abstract: The LGBT right to adopt is an issue, which is extremely necessary to research in the context of Vietnam. There are some controversial problems relating to the LGBT right to adopt, including: Should this right be legalized? How have their rights been limited in Vietnam? What should we do to protect this right for LGBT in Vietnam? In our opinion, these questions should be answered clearly and comprehensively, especially in the political, social, and economical contexts of Vietnam. There have been some scientific publications in Vietnam over the past few years concerning this topic. They show that LGBT persons wish to adopt children, but this right has not been legalized under Vietnamese law yet. In fact, some LGBT persons, especially same-sex couples, are still living together as a family without legal guarantees such as conditions of personality, mutual property, as well as the nurturing and taking care of children. In this paper, the authors analyze and evaluate the shortcomings of ensuring conditions for the LGBT right to adopt as well as the reasons why they exist. At the end of this paper, the authors point out some long-term and urgent solutions, as well as the ways to actualize them in the conditions of Vietnam in order to protect better the LGBT right to adopt.

Keywords: Right to adopt, LGBT, sexual equality, sexual orientation, gender identity.

1. Overview of the LGBT community and LGBT community's adoption rights

LGBT is an acronym for Lesbian, Gay, Bisexual, Transgender, used to describe a person's sexual orientation. As defined by the American Psychological Association (APA): Sexual orientation refers to an enduring pattern of emotional, romantic and/or sexual attractions to men, women or both sexes. Sexual orientation is distinct from other components of sex and gender, including biological sex (the anatomical, physiological and genetic characteristics associated with being male or female), gender identity (the psychological sense of being male or female) and social gender role (the cultural norms that define feminine and masculine behavior)². With the above definition, sexual orientation includes both emotional and physical attraction to another person. Furthermore, gender identity may or may not be identical with the assigned gender postnatally based on their biological sex.

According to Article 1 of the 1948 Universal Declaration of Human Rights: “*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*” Thus, human rights are natural, inherent and objective rights that need to be recognized, respected, protected and made sure that LGBT persons deserve to enjoy the full range of human rights, including: life, liberty, and pursuit of happiness. This is created from getting married or being

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² Sexual Orientation & Homosexuality, Sexual Orientation & Homosexuality. See: <https://www.apa.org/topics/lgbtq/orientation> last accessed 6/8/2021.

a parent of children... Therefore, the rights of LGBT persons need to be guaranteed and the right to pursue happiness is no exception. In which, the right to get married and the right to adopt children are considered sacred rights in the life of each individual. In addition, a family will be formed, connected together by affection and sharing among family members. Protection of LGBT persons' rights is one of the measures to ensure the social value of the law, with an aim to fairness and equality - the noble goal of the law. Therefore, in essence, the legalization of marriage and adoption of a same-sex couple does not adversely affect the development of society. On the contrary, this action also brings benefits in public health, gender equality, and social harmony.

Adoption rights of LGBT persons.

*Human rights are the ability of individuals to exercise natural and independent privileges, both as human beings and as members of society, guaranteed by a system of national policies, laws, regulations, international legal agreements on human values in material, cultural and spiritual relations, the needs for freedom and development*³. In terms of ethics, social standards, and human rights perspectives, LGBT persons' adoption rights are rooted in the essential needs and desires of people's happiness, which are recognized by national standards and recognized by the international community. It can be understood: *"The LGBT rights to adopt are the natural independent demands of gay, bisexual and transgender persons, bearing the common characteristics of human rights and the specific rights of the LGBT persons. to ensure the needs and desires of the LGBT person's right to parenthood, which are recognized, promoted and protected by law"*. Through this understanding of the LGBT right to adopt, it could be confirmed that the LGBT right to adopt has characteristics, including: Firstly, the LGBT rights to adopt have common characteristics of human rights; secondly, the LGBT rights to adopt are rights of Vulnerable and Disadvantaged Groups need to be guaranteed in society; Lastly, the LGBT rights to adopt reflect the spirit of humanity.

The relationship between adoption and other rights

Firstly, the relationship between adoption and marriage rights of LGBT couples. Adoption and marriage rights of LGBT couples are two non-conflicting rights. In countries such as the US, France, and Taiwan, the recognition of joint adoption is essentially based on some legal form for cohabitation relationships, including LGBT persons. If a heterosexual couple wants to adopt a child, they must legally get married. Therefore, for LGBT couples, it is also necessary to have a legal mechanism to record their relationship, then there is a basis for implementing adoption rights. However, there are also a few countries that recognize adoption as an independent right, while not recognizing the marriage of LGBT couples such as Andorra (2014), Australia (2016)...⁴

Secondly, it is the relationship between the LGBT right to adopt and the right of children who are adopted. These two rights are closely interrelated. On the one hand, if the adoption of LGBT persons is recognized by law and implemented in practice, the relationship between the adopted LGBT couple and the child will increase the cohesion; family affection through the bond between parents and children was created. In addition, this is also a premise to ensure children's rights such as the right to be nurtured, the right to be educated as well as the right to health, etc.

Thirdly, the relationship between the LGBT right to adopt and equality, without discrimination against people in society. The legalization of the LGBT right to adopt will be a condition to ensure the right to equality for all persons in society. In opposition to this, if

³ Chu Hong Thanh (1997), Human rights and international human rights law, Publishing House. National politics, Hanoi, p. 23

⁴ European Parliament (Briefing) (May 2016), The rights of LGBTI people in the European Union, p.5

the adoption rights of LGBT persons have not been recognized, gender-related discrimination and stigma will still exist and lead to their other basic rights which is easily violated.

2. Inadequacies in ensuring the LGBT right to adopt in Vietnam and their causes

2.1. Inadequacies in the provisions of law

In fact, during the previous period, the adoption of children by the LGBT persons has happened. However, due to many limitations of the law, there are still many shortcomings.

Firstly, in provisions of the Law on Gender Equality, the concepts are only concerned with “gender” and “sex”⁵, it enables people who have “sexual orientation” or “gender identity” to be different from the majority of individuals in society and is not regulated by the law. This has caused difficulties in the implementation of legal institutions for LGBT couples in general, current regulations on child adoption, care, and protection, and especially in the gender identity of transgender people in the adoption process.

Secondly, Clause 3, Article 8 of the Law on Adoption in 2010 stipulates: “*A person may be adopted by only one single person or two persons being husband and wife*”. However, the Law on Marriage and Family only recognizes legal marriages between men and women, but not people of the same sex⁶. This leads to the LGBT persons being pushed out of the law's protection. Because the current law does not prohibit two same-sex persons from living together, but it does not recognize it in any legal form, *in the case of joint adoption (the child is not related by blood to both people) of lesbian, gay, bisexual, transgender couples are not allowed by the law on adoption*.

Thirdly, the fact that the law has not yet allowed gay, bisexual, and transgender couples to adopt children, leading to them finding ways to “evade the law”. Therefore, one of them will adopt a single child according to Clause 3, Article 8 of the Law on Adoption 2010. This has raised many civil rights-related problems, for example, the person who does not take the initiative to adopt the child will not be able to represent or guardian for the child; the person who does not adopt the child will not have any parent-child or inheritance relationships with that adopted child⁷. Especially in the bad case that the LGBT couple breaks up and no longer has a cohabitation relationship, how will the child custody dispute be resolved. Failure to solve that problem can cause great harm to the child, particularly children under 18 when their thinking is still immature.

Fourthly, in the case of surrogacy adoption for a gay couple (“surrogacy”) or assisted reproduction for a lesbian couple (one of the two sperm applicants) also raises many legal issues. According to Clause 4, Article 24 of the Law on Adoption 2010: “*Unless otherwise agreed upon between the natural and adoptive parents, from the date of delivery and receipt of the adopted child, the natural parents no longer have the right and obligation to take care of the child provide financial support, represent at law, compensate for damage, manage and dispose of personal property for their child already adopted*”, the cohabitant cannot adopt a child and become adoptive mother or father because the law regulates that once the adoption relationship has been established, the biological parents no longer have rights and obligations

⁵ Law on Gender Equality 2006

⁶ Clause 2, Article 8, Law on Marriage & Family 2014.

⁷ Truong Hong Quang (2014), On the cohabitation relationship of same-sex people in the Draft Law on Marriage and Family (amended), Institute of Legal Science - Ministry of Justice

towards this child. This makes it impossible to guarantee the rights of both same-sex couples to their child⁸.

Fifthly, in fact, Vietnam currently does not have a specialized agency to protect human rights in general and the rights of disadvantaged groups in society in particular. Moreover, the supervision of the process of care and education of adopted children is still loose, with parents' periodically reporting only leading to the protection of the adopted children's rights not being guaranteed.

2.2. Inadequacies in the legal procedure

The procedure for adoption registration, as regulated by the Law on Adoption 2010, Decree No. 19/2011/ND-CP, and Decree No. 24/2019/ND-CP, has a lot of inadequacies. This is as following:

Firstly, there are a plenty of complicated requirements for adoption. Law on adoption requires that an adopting person must fully meet the conditions: Having good health, financial and accommodation conditions for assuring the care for and nurture and education of the adopted child; as well as having good ethical qualities⁹. However, because each of the foregoing prerequisites has no concrete explanation or evaluation criteria, it will be applied differently in each community. As a result, determining in accordance with the law's criteria is challenging.

Secondly, the "validity" of the adoption files is not clearly defined in the legal documents. After evaluating the adoption files, the civil servant can affirm that it is "void" and has no reasonable explanation. However, determining the profile's veracity is challenging. Will the civil servant return the application on the grounds that it is "invalid application" or will it be regarded a "valid application" and the application process will continue if the adopter does not fulfill one of the necessary conditions? Because the adoptee is LGBT, should you consult with the appropriate people?¹⁰. It's also a legal gap that has to be solved to avoid future harmful consequences.

Furthermore, the mass media has not adequately pushed its role, and there are few official publications, activities, or legal advertising concerning the LGBT persons and the protection of LGBT rights. Organizations such as the ICS Center, iSEE, and PFLAG Vietnam are active, however they haven't had much of an impact on legislative lobbying and aren't broadly recognized.

2.3 .Causes of inadequacies

The challenges that the LGBT persons face in life stem from a variety of sources.

In subjective causes, LGBT persons still have low self-esteem, are unconcerned about themselves, do not want or need to come out their sexual orientation, and are not interested in being informed about the adoption rights. The LGBT persons' challenges are more and more difficult to solve because of lacking their self-confidence and not active in learning, exercising, and securing their own rights.

In objective causes:

⁸ Truong Hong Quang (2014), On the cohabitation relationship of same-sex people in the Draft Law on Marriage and Family (amended), Institute of Legal Science - Ministry of Justice

⁹ Clause 1, Article 14, Adoption Law 2010

¹⁰ UNDP - USAID Viet Nam (2014), Adoption of Gay, Bisexual and Transgender Persons in Vietnam - Status and Recommendations, p.35

Firstly, society's knowledge of the LGBT persons' adoption rights remains limited. People are now more interested in the LGBT persons' ability to marry. As a result, child adoption is still not a hot topic.

Secondly, social prejudice has an immense impact on LGBT persons' adoption rights. Society's harsh attitudes and reactions stem from traditional concepts of marriage between a man and a woman, monogamy, a wife giving birth to children to perpetuate the family line, or children whose parents are LGBT persons cannot grow up appropriately. As a result, removal of discrimination barriers in civil marriage access remains an essential problem in Vietnam in order for the country to adapt to the evolving global notion of human rights and marriage¹¹.

Thirdly, the inadequacies and limits derive primarily from the fact that the LGBT persons' adoption rights are not recognized under Vietnamese law. In addition, current legislation only recognizes the relationship between male and female in legal normative documents, and of course has not yet accepted officially the relationships between different sexual orientations.

3. Recommendations for ensuring the LGBT right to adopt in Vietnam

3.1. Strategic solutions

+ General solutions:

One of the most important and prerequisite solutions to ensure the LGBT rights, including the right to adopt children, *is the demand to change social awareness and attitudes.*

For LGBT individuals: They need to be more active, should have a positive attitude and should be more confident in their own lives. LGBT individuals or LGBT couples who wish to adopt a child should have a good physical and mental preparation before deciding to adopt a child.

For LGBT persons' families and their relatives: LGBT people must be the ones who actively confide and express their thoughts and aspirations so that their parents can sympathize and understand them. At the same time, it is the fathers, mothers or relatives of LGBT persons who must actively seek information and knowledge about the LGBT persons through official sources to better understand LGBT persons as well as their rights that they deserve.

For the social community: We need to innovate in the traditional concept - the Asian culture that is deeply rooted in Vietnamese culture. In addition, it is necessary to promote education, propaganda and dissemination of knowledge relating to the LGBT persons (expanding activities of organizations and groups relating to the LGBT persons; promoting the role of mass media; integrating knowledge concerning to the LGBT persons into sex education...). The education about homosexuality and sexual diversity will help to eliminate stereotypes about homosexuals and sexual minorities in general¹².

+ About the group of solutions to improve the law

The recognition and legalization of LGBT rights in Vietnam, especially the right to marry and to adopt children, cannot be changed instantaneously but needs to go through a long process. To move towards recognizing and ensuring the LGBT right to adopt, according to our opinions, we need to implement the following solutions:

Firstly, in order to ensure the equality, non-discrimination and to create favorable conditions for the recognition of LGBT people's adoption rights, some legal concepts of "gender", "sex",

¹¹ Truong Hong Quang (2016), International law on the rights of gay, bisexual and transgender people, Journal of Legislative Research No. 23 (327), Issue 1 - December 2016, p.23

¹² iSEE, ICS, APA (July 2012), Answers to your questions about homosexuality and sexual orientation, at <http://www.thuvien.lgbt/camnang>, last accessed 2/ 11/2021, p.4

"gender equality" in the Law on Gender Equality need to be changed and this law should define the "sexual orientation" and "gender identity" norms without considering biological sex in comparison to current law.

Secondly, the implementation and guarantee of the LGBT right to adopt need to be carried out in a specific process. At present, a suggestive solution for Vietnamese law is *that the state should issue a certificate of civil relationship (civil union) to same-sex couples with legal consequences such as the pre-nuptial contract of the law*. This is an important step towards legalizing same-sex marriage in Vietnam. On the legal level, *this certificate of civil union will solve problems relating to marriage and family relationships including of common property or child adopted rights and obligations of same-sex couples*. However, this is only a temporary solution. In the coming time, Vietnamese law makers should legalize same-sex marriage to create legal frameworks for LGBT right to adopt. At that time, it is necessary to amend the provision "Men and women have the right to marry and divorce..." in Clause 1, Article 36 of the 2013 Constitution to "Everyone has the right to marry and divorce...", and at the same time amend the Law on Marriage and Family in 2014 on the principle of recognizing the marriage relation between two people without discrimination of the same or opposite sex and abolishing inappropriate regulations.

Thirdly, legislators not only review to amend and supplement more appropriate provisions in the Civil Code; Law on Adoption; The Law on Children ... but also must prescribe the by-laws to guide the conditions of the adopter.

In *the Civil Code 2015*, regarding the right to have a guardian, in case an LGBT couple lives together and one person is the biological father or biological mother or adoptive father or adoptive mother but has no conditions to take care of the child (due to long business trip or in the process of medical treatment), the other person who is not the child's father or mother in a legal perspective will become the natural guardian (such as a "relative") or be given preferential appointment at the suggestion of the child's parent. According to Articles 49, 50, 52, 53, and 54, this provision has not created favorable conditions for those who are not "relatives" of the child as defined by law but it is a person who have close relationship and have the best care child conditions (for example, staying with the child and taking care of the child in practice) becomes the guardian.

In addition, *for Law on Adoption in 2010*, after recognizing the cohabitation relationship of LGBT couples from a legal perspective, it is necessary to amend Clause 3, Article 8 of the Law on Adoption 2010 from: "A person may be adopted by only one single person or two persons being husband and wife" to: "A person may be adopted by one person, two persons being husband and wife or a couple with a certificate of civil union".

For *the Law on Children 2016*, it is necessary to add the principle of nondiscrimination against children based on the gender and sexual diversity of themselves or their parents or guardians.

In *legal normative documents*, it is necessary to add specific guidance on the conditions of adoption and provide evaluation criteria for each condition in order to ensure that the review of the application for adoption is transparent and legitimate, to ensure the rights of everyone without discrimination based on sexual orientation or gender identity while implementing adoption procedures. Moreover, it contributes to ensure the rights of children when they are adopted by an eligible person.

Fourthly, instead of only stipulating that when parents raising a child must make periodic reports, or regulations on inspection and examination as at present, *legislators need to supplement regulations on adoption supervision and establish a separate agency to carry out this function*. In addition, to prevent negative impacts and effects from stigmatization, discrimination or even violent acts affecting the psychology and development of children, we

need to implement synchronous solutions from propaganda and education to change awareness and attitudes to set up appropriate sanctions. Therefore, it requires a mutual cooperation among the State, social organizations, families and the entire community.

3.2. Immediate solutions

To ensure the aim and desire of LGBT persons as well as of children to fully enjoy the human rights, "nondiscrimination against children" and "in the best interests of children," the following solutions should be implemented immediately:

Solutions for improving the social awareness:

Firstly, LGBT persons must have more positive actions, confidently live as themselves, and build a beautiful image in the heart of the social community. Moreover, individuals, who are famous LGBT persons or who have great influences to the community, should promote communication and speak up to protect their rights and interests.

Secondly, The Ministry of Education and Training needs to continue to expand sex education programs at all educational units. Specifically, some lectures can be supplemented in school subjects such as sex education in Biology, LGBT rights issues into Citizenship Education, stories relating to the LGBT persons in Literature to impact the students' perception.

Thirdly, The Ministry of Health must promote scientific information concerning to sexual orientation, gender identity, and other issues to agencies, organizations, and individuals, especially medical examination and treatment centers and health workers. Furthermore, it can develop and organize programs to guide the care, nurture, and access to health care services for children. Therefore, LGBT persons who want to adopt children can participate to gain knowledge and skills to raise adopted children in the best way.

Fourthly, news agencies and mass media must do more to emphasize their role in ensuring LGBT persons.

They should actively report, post official articles or organize programs promoting common values from a more favorable perspective so that people have a more positive impression of the LGBT persons; they should expand the scope of information dissemination to rural and countryside. Therefore, individuals may better comprehend LGBT persons as well as they understand themselves and their rights.

In addition, we need to premiere movies, videos, photos, or music programs related to LGBT persons and their rights. This is a way that people easily approach and change their impression of LGBT persons. For example, in Canada, the documentary movie that is "Mommy Mommy" was released in 2007 (by director Sylvie Rosenthal), it is about the five-year struggle to have a child by a Montreal lesbian couple; and "Preacher's Sons" is an American documentary movie in 2008, by C. Roebuck Reed and Mark Nealey. When these two movies were released, they had a major influence on the attitudes and opinions of many people in these two countries. Therefore, *in Vietnam, it is also recommended to learn and use such films to alter their view and modify their behavior toward LGBT persons and children adopted by them.*

Finally, social organizations, especially those promoting and protecting the rights of the LGBT persons such as ICS Center, iSEE, PFLAG Vietnam, need to be more active and coordinate with agencies to expand their scale and influence in society. For example, they can plan and organize exchanges, knowledge sharing, and events (forums, picture exhibitions, music shows, etc.) to provide basic information about LGBT persons. They should begin with implementing it in large cities such as Hanoi, Ho Chi Minh, Da Nang... and then spread and expand the organization's region in rural and countryside.

Solutions for improved law and enforcement mechanisms

First of all, we need to research to develop a comprehensive set of concepts namely "gender", "gender", "sex" and "gender equality".

Secondly, competent agencies and individuals should immediately inspect relevant legal normative documents to find "loopholes", shortcomings, or contradictions in current regulations that affect the process of ensuring the rights of LGBT persons and their adopted rights. It contributes to perfect the legal system, to facilitate agencies, organizations, and individuals in the implementation of the law. Furthermore, regulations are going to be eliminating overlaps and inconsistencies in interpretation, which causes difficulties for LGBT persons as well as those who implement the legal procedures for adoption.

The third solution is to establish free hotlines to provide psychological information and give advice, answer questions for LGBT persons, their families, and friends, or even people who want to know LGBT persons and their rights.

Fourthly, to ensure adopted children, we need to research and prepare the best conditions (such as human resources, finance, etc.) for establishing an adopted monitored mechanism. Currently, bureaucrats working related to children and families at commune-level People's Committees can take on the responsibility of periodically supervising LGBT families who have adopted children. Moreover, this agency can also set up a hotline to receive information and feedback from the social community when they find that LGBT parents do not satisfy the conditions for nurturing, educating, and taking care of children or violating children's rights. At that time, they will promptly intervene to resolve transgressions and prevent physical and mental effects for the adopted children.

Lastly, the State needs to pass appropriate policies such as promoting propaganda, education, and changing people's awareness to protect and prevent discrimination against LGBT persons and children adopted by LGBT parents. Furthermore, we should continue to replicate community support models that protect the rights of LGBT persons and children rights. Specifically, we can develop models of the Central Vietnam Women's Union such as "Peaceful House" and "Community's Trusted Address". Because, these models are promoting well in protecting the rights of women and children, especially in cases of domestic violence, human trafficking... at the moment. The family (especially parents) also needs to educate and build a psychological foundation for the child, to avoid being "shocked". "Basically, parents must be aware of the functions that the father and mother need and perform in the relationship: Child - Mom - Dad. The mother's warm embrace, the father's firm supportive embrace bring a sense of security to the child. This will help children decrease "shock" and gradually adapt to new living situations. Respect, love, and honesty are essential components in assisting children in overcoming trauma. Behavioral Parents should be focused on two main aspects: significant support, adequate control for children to feel supported and safe".¹³

When the above solutions have been implemented, but stigma, alienation or discrimination still occurs to the adopted child, it is necessary to continue to implement the following solutions:

At educational institutions where the child attends, if stigma, discrimination, or school violence occurs, the involvement of mass organizations such as Pioneers' Organization, Communist Youth Union, Parent-Teacher Association, and schools cooperating with children's families will choose a way to thoroughly solve problems (such as criticism, warning, discipline, even being forced to quit school).

¹³ This is the general opinion of Assoc. Prof. Dr. Tran Thu Huong (Lecturer of the Department of Psychology, University of Social Sciences and Humanities - Vietnam National University), the opinion of Dr. Truong Hong Quang and many other experts which are direct interviewed by the author.

In the community where the adopted child lives, if there is discrimination, alienation, and violence from people around, it will be necessary to have the intervention of the local government in combination with the family and psychologists to find the most reasonable and effective solution.

In the two cases mentioned above, if that stigma or discrimination causes serious consequences, negatively affecting children's life, psychology, development, then appropriate punishments must be imposed on individuals who have had such negative attitudes or behavior (administrative sanctions, criminal prosecution).

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