

The lesbian, gay, bisexual, transgender and issues of legal system innovation

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Abstract: *The book provides an overview about the community of the lesbian, gay, bisexual, transgender in general, these subjects in Vietnam in particular, and their demands; in-depth legal discussions on the issues are also triggered in the time to come.*

Key words: Sexual Orientations, Human Right, Gender Identity, Lesbian, Gay, Bisexual, Transgender (LGBT)

1. General issues about LGBT

It has been thought that Lesbian, Gay, or Bisexual are considered “the third gender” beside male or female. In the viewpoint of the writer, however, this thought is definitely wrong. There are two genders only in society - male or female; then gay or lesbian or bisexual has relations to another concept, it is *sexual orientations*. There are 5 main sexual orientations, inclusive of *Heterosexual* - be attracted to the opposite gender; *Homosexual* - be attracted to people of their own sex; *Bisexual* - be thinking of having a

different gender rather than his/her own biological gender and attracted to both men and women; *Pansexual* - be attracted to any gender; *Asexual* - be unattracted to any gender. In these categories, homosexual and bisexual are two out of five sexual orientations of human that are not involved in gender issues.

Sexual orientations are not exposed for others' recognition but mostly in closets, which is popular for homo- and bi-sexual orientations. Individuals can even not understand thoroughly how such orientations developed;

formation and growth of them in each individual are all different. Many people cannot identify their own sexual orientations until they get mature. However, from the writer's records, it is said by scientists that this orientation forms at very young ages due to complicated inter-effects of biological factors (main and basic factors), psychology, and social life. Some try to change from homosexual into heterosexual, but fail finally. Psychologists, therefore, do not consider sexual orientation is an awareness-based choice that one changes at her/his discretion; it is a in-born nature of individuals. Homo- and bi-sexual are not mental disorders but normal phenomena. People of such sexual orientations are definitely not at their discretion selection.

Distinct from homo- or bi-sexual, to understand further the transgender, in writer's opinion, a concept of sexual orientation and gender identity (SOGI) must be in consideration. SOGI means how individuals perceive their own gender (same or different than the sex assigned at birth). The writer thinks that in general understanding, an individual that perceives her/his gender that is same with at birth biological sex and is sexually attracted to people of her/his own sex is a homosexual. The person that is sexually attracted to people of opposite sex is a heterosexual. The person, however,

who perceives their own gender different from at birth biological sex is a transgender regardless of any operations.

Homosexuals, bisexuals, and transgenders face many problems in their life. *The first problem* is sexual orientations and gender identity. Some people of incorrect understanding think that sexual orientations can be altered thanks to medical or pharmaceutical solutions. Others thought that roots of homosexual phenomena are because of psychological and spiritual impacts, resulting in persuasion or coercion towards homosexuals' marriage to opposite-sex people with an aim to change the status. In fact, such are wrong viewpoints; the homosexual, basically, are people of normal psychology and biology; the transgender's gender identity are natural and impossible to alter. *The second problem* is discrimination. The homosexual (even the bisexual that manifest their homosexual tendency), have to face the *homophobia* which is scary attitudes, prejudice and discrimination against the homosexual at work or in social activities; another case is the homosexual have a phobia about themselves. It is the phobia that makes them hurt or feel guilty, inferior, and isolated, leading them to use stimulants, have indiscriminate sex, or more seriously commit suicide. *The third problem* is exposure of sexual orientations and gender identity, which

is a desire of the LGBT. In front of social prejudice, however, the LGBT face many difficulties at SOGI exposure. To walk out from the closet is a big challenge for the LGBT. People only know once sam-sex love of the LGBT is outed. When the homosexual live with their own sexual orientations, the majority have normal appearance whereas the transgender have a strong gender identity. Hence, the transgender can be recognized through dressings and manners instead of outing who they are. At their own gender identity, the transgender often disguise or make-up, resulting in discrimination and alienation.

2. Foundation about human rights of the LGBT and the international law for this community

In the writer's viewpoint, rights of the LGBT basically is natural rights of human.

First of all, it is equality of the right to life and freedom. The LGBT are normal people as every individual in society, able to fulfill their obligations and entitled to equal rights as others. One of the most crucial is the right to recognition and respect. It is the right of the LGBT to out their SOGI. Therefore, the society need to consider the LGBT as normal people of full rights and obligations and must not have any pejorative or insulting attitudes or consider them as patients of mental deviance.

Second, it is their pursuit of happiness. It is an expression of freedom; human, on their own capability, have rights to pursuit of happiness and living values. This is an apparent value in all socio-political regimes. One of such values is founded from marriage and family up-building, respected and protected by the State. However, marriage of the LGBT is very difficult. In the world, for example, the homosexual's legal cohabitation is recognized, such as marriage like the heterosexual, civil unions like partners or partnership, etc. They are legally considered couples as husbands and wives but limited at favorable policies of tax decrease or exemption, social welfare, insurance, benefits at child adopting rights, inheritance, etc. On the other hand, legal values of the civil union certificate (a lower type than equal marriage) are so limited and not valid in nation-wide or in the world.

The United Nations (UN) have strived for basic rights of the human in general, including the LGBT. Despite confirmation of human rights, inclusive of rights of the LGBT as in *Universal Declaration of Human Rights 1948*, discrimination and violence are popular in the world. Statistics of the UN Office of High Commissioner for Human Rights showed that the law in 76 countries still discriminate and criminalize homosexual relationships, and the

homosexual are arrested, prosecuted, and imprisoned.

The LGBT's human rights have been better since 2011. 85 States and Territories altogether signed a Joint Statement about ceasing human right violence and violations against SOGI. Supports provided by members of the UN Human Right Council facilitated for the first detailed report written by the UN Office of High Commissioner for Human Rights in November 2011, aiming to summarize violence and discrimination against the LGBT in all corners of the world. The report proposed recommendations for States' protection of the LGBT's rights.

Nations in the world, in all aspects, give different viewpoints about the homosexual. Many nations like Norway, Australia, Mexico, Netherland, Belgium, Denmark, etc. Promulgated the Law that prohibiting discrimination against the homosexual. However, attitudes of such nations about specific rights of the homosexual are distinct. Rights to marriage, for instance, a few countries accept equal marriage rights for the homosexual (even for the transgender), but many other nations do not, or a few of others accept as civil unions only. Besides, some countries do not recognize the homosexual's rights, and their sexual relationships are considered crime.

Until end of February 2014, 17 States and Territories (Netherland, 2000; Belgium, 2003; Spain, 2005; Canada,

2005; South Africa, 2006; Norway, 2008; Sweden, 2009; Portugal, 2010; Iceland, 2010; Argentina, 2010; Denmark, 2012; Uruguay, 2013; Wales, 2013, Scotland, 2014) recognized equal marriage rights of the homosexual. Besides, only some parts of 3 countries accept, which are the US, Brazil, and Mexico.

When legalizing equal marriage rights of the homosexual, most nations do not have sole rules with the title "Homosexual Law" but the new law that re-defines marriage, abolishes gender conditions of two sides regardless of any sex, sexual orientations and become valid for all. Constitution of certain countries also provides regulations prohibiting against discrimination at any SOGI (such as South Africa's Constitution). At other nations, even though their constitutions have not stated prohibition against sexual orientations, equal marriage rights of the homosexual are still recognized by law.

A tendency of recognizing the transgender has been significantly changed in recent years. Many States and Territories, such as Argentina, South Korea, Canada, Taiwan, have been fighting for the transgender who should be able to alter individual papers at their desire gender without any sex change surgeries. This tendency manifests the highest development in protecting and guaranteeing the transgender's benefits.

3. The LGBT's community in the socio-legal life of Vietnam

** The LGBT in Vietnam*

Like many other nations, to study the status of the LGBT in Vietnam now is difficult due to different reasons. One of the most important reasons is they little out who they are but closet themselves in a community, the law has not officially recognized their rights as the heterosexual. There has not any national studies about quantity, location, and characteristics of the LGBT. Besides, it is not easy to distinguish the homo- and bisexual since the bisexual sometimes manifest as the homosexual. Therefore, the homosexual in Vietnam in the book may include the bisexual. In fact, the society often talk about the homosexual rather than the bisexual.

A report released at a Technical Scientific Conference held by the Dermatology Hospital Hochiminh City in September 2006, there has not any specific figures about the gay in Vietnam. An average and "safe" ratio stated by scientists is 3%, then the number of gay in 2012 was 2.66 million.

As the homo- and bisexual, the number of the transgender in Vietnam cannot be assumed easily, particularly when the transgender are not limited in people of sugeries but include ones who perceive their sex different from the biological gender.

The number of the LGBT outing who they are has been increasing. Their activities and figures of published materials have never been as boosted as before. Relevant fora for the LGBT have also been escalated. Accoring to a recent survey, nevertheless, most of people who were asked their thinking about the kin of "sex problem" felt astonished, rejected, disappointed, angry, panicked, lost. Many parents feel shocked or even panicked to know their kids are LGBT, then such parents had uncontrolled behaviors like hitting, chaning, locking, or prohibiting, etc. Many of them even take the kids to see psychologists or have kind of treatment due to a thinking that their kids have mental problems. Such families try to closet and not to out kids' sexual orientation. It is prejudice and formed thought of kin and community that lead the homosexual into desperation.

A 2012 study shows that discrimination against the homosexual in Vietnam is popular. A primary reason is because social background understanding about sexual orientations is limited. Many homosexual divide their life into two separated halves: to be honest in their own community and have same-sex partners whereas to disguise as a heterosexual in front of family, colleagues, friends. Many of them get or want to get married to the opposite gender, aiming to escape from pressure

and create their own heterosexual cover. Many of them, after marriage, still remain homosexual relationships at different degrees. Besides, it is social discrimination that the LGBT face big troubles at reaching health care services. Because of their inferiority complex, the gay prostitution hardly check their health and receive relevant treatment of sexually transmitted infection. That leads to the surging number of HIV infection among the gay prostitution.

** Legal issues*

Regarding an issue of transgendering^(*), the Civil Law prohibits people of complete gender from having any transgender surgeries. The Vietnamese Law has not allowed to have transgender surgeries, which leads ones desiring their own gender to travel to Thailand or Hong Kong where allow for surgeries to get what they want. The fact in Vietnamese hospitals recently has shown high demands for transgendering.

In terms of marriage, family, and civil relations, the Vietnamese LGBT do not have to face strict rules or discrimination as in other nations as in the Vietnamese law system; the LGBT get rights as the heterosexual. The

local law does not either prohibit homo- or bisexual phenomena or imprison/sentence to death the homosexual as in other nations. The current law, however, still prohibits their same-sex marriage.

Many in the homosexual community do not trust long lasting relationships because the law does not recognize and protect them. Family pressure, social prejudice, and prohibited marriage are difficulties of the homosexual. Nevertheless, the number of the homosexual outing and loving each other has been increasing. When living together, they have arising problems such as asset possessions, investment, giving birth, raising kids; therefore, they have higher demands for being protected by law.

Although the Law has not allowed, same-sex marriages have been publicly held recently. When they live with the other, many related legal issues arise, which is out of their own handling, especially benefits and representative rights. For instance of asset, a same-sex couple are entitled to co-possess a piece of land, a house, but in reality, only one of them due to mutual trust or lack of legal understanding. This fact may harm the benefit of one of the couple. Adopted children of the homosexual couples are not recognized by law. Many social viewpoints state that same-sex couples shall not get married, give birth, raise or adopt children because such kids may grow

^(*) On 24 November 2015, the National Assembly of Viet Nam approved the Amended Civil Code. The law will, for the first time, allow people who have undergone gender reassignment to register under the new gender. The Law becomes valid from 1 January 2017.

abnormally. The writer, however, affirms that the child raised in same-sex family cannot become a homosexual unless her/his at-birth nature is a homosexual.

Beside approvals, the ratio of disapproval for the homosexual and their marriage rights is not small. According to an online survey carried out by the National Assembly, more than 90% ideas fully agree with the regulation of same-sex marriage. However, another direct survey shows that social ideas about same-sex marriage have not been changed dramatically. For example, a result obtained by a Research Institute for Socio-Economy and Environment in 2012, 77% of Vietnamese people (in 4 provinces) were asked if rights of the homosexual should be protected, only 36.6% agreed. This result was in contrast to the National Assembly's online survey. This can be explained that it is due to online survey that may not as true as in reality when one person is able to give comments many times, especially the homosexual could continuously approve... Besides, through social media, newspapers, there are some ideas stated that cohabitation with registration should be recognized, then further review, studies, and evaluations can be considered to recognize equal marriage for the LGBT.

Regarding the criminal justice field, a traditional concept about "copulatory

behaviors" has had significant impacts on enforcing criminal law provisions on illegal sexual acts between people of same sex (use of force, threat of force or use other tricks to make other men who have sex contrary to their wish; or trickery to make same-sex people dependent on them or are in dire straits reluctant to have sex; or have sex with the under sixteen homosexual). Hence, children of sexual abuse by a male are mostly boys, but the agency does not handle proceedings on charges of rape and switch to charges of "child obscenity", and the penalty frame is not appropriate.

Besides, the right of homosexuals and transsexuals in criminal law and criminal enforcement is not guaranteed. For example, in criminal proceedings, "body search" is an investigating measure by ransacking body and clothing or belongings of the accused or arrested in an emergency or flagrant offenses, or ones having arrest warrants to detect necessary documents, exhibits related to the case. As a rule, the male search the male, the female search the female, what about the transgender?

There have been high demands for protecting equal rights of the LGBT in Vietnam recently. On a base of studying the Vietnamese LGBT community and some relevant legal issues in the national law system, the writer proposes general directions and

specific recommendations to the national law, aiming to protect the LGBT's rights regarding civil cohabitation, marriage, family, the administrative law, criminal justice and others.

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At the end of the book, the writer emphasizes that it is time for Vietnam's society to have further comprehensive view about members of different sexual orientations and sexual

identity, and to give them the right to normal life as other individuals in human beings' community. That we delve into the area, evaluate their rights does not mean we approve for a new bad trend but for an objective stand to make our society more humane. To create an equal society for citizens is a truly humane value of the law. Civilized society is the one that has a legal background filled with the humanity and has sustainable replication roots.