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# Law on Gender Transfer in Vietnam Situation and Solutions

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## ABSTRACT

*In Vietnam today, the issue of transgender is gaining a lot of attention from society in large part because of movements, activities for the rights of homosexual, bisexual and transgender people. In particular, the fact that Vietnam's Civil Law 2015 regulates transgender in Article 37 has created a need to build and complete the legal basis for this activity. Determining the approach when formulating the law on transgender is an important issue especially in the context of a right-based approach (right-based approach) is a mainstream trend in the world. This article tries to clarify the current situation of gender change in Vietnam and propose some recommendations and solutions to improve the law on transgender in Vietnam today.*

*Keywords: Law, gender transfer, Vietnam, transgender.*

## I. PROBLEM STATEMENT

Gender transference (also known as "transgender" for short) is a legal and social issue associated with human rights. Transgender rights have been very concerned by the international community for about three decades. Transgender people are those who feel that their own gender is different from their assigned sex at birth. This definition emphasizes self-confession, not whether or not they have undergone sex reassignment surgery. Transgender, which can be interpreted as medical or non-medical measures to realize that self-confessed sex desire. There are transgender people who may not have the desire to implement transgender measures for economic, health, family ban or social discrimination reasons. There are a number of reasons why people who consider themselves different from their sex at birth, including biological factors such as genes, hormone levels before pregnancy, experience in adolescence or adulthood ... Many studies show that a transgender person often feels about their own sex early, 3-5 years, but publicly recognizes themselves which gender depends on the knowledge of each individual as well as the openness of each society.

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There are three basically ways in the world that you can change your name with transgender people: Change your name with administrative procedures; Renamed by court judgment; and renamed by the actual declaration procedure. Transgender issues have long sparked mixed debate in countries. There are many aspects discussed, in which the main question is: Does legalization of transgender lead to mass transfer surgery or to take advantage of this to avoid obligations to the state and society? Regarding the above question, it should be noted that when legalized, transgender surgery will have to follow a strict legal-medical procedure, with clear conditions and standards, controlled and supervised by many actors, so the above concerns can be addressed. In fact, it is the trans-legalization of transgender that poses a lot of risks for transgender people and society, because the "underground" transgender process is not standardized and controlled.

Research in the world shows that the percentage of transgender people is from 0.1% to 0.5%. In Vietnam, there has been no research on the number of transgender people, however, if using the low average of the world (0.1%), it is estimated that our country has nearly 100,000 people transgender. According to a survey by the Institute of Social - Economic and Environmental Research (iSEE) in 2012, in fact, active transgender forums and groups have more than 125,000 members, of course, all participants are not transgender people, or transgender people do not participate in these forums or groups.

In recent years, the issue of sexual trend and gender identity has been increasingly discussed widely, along with the issue of gay, bisexual and transgender rights (LGBT in English). ) is also increasingly attracting the attention of the international community. In international law, transgender rights are now commonly recognized in LGBT community rights documents. The first and fundamental right for other human rights of this community is equal rights. Even in the Preamble to the Charter of the United Nations (1945), it is stated that the basic rights, qualities and values of human beings are equal, without any discrimination. The Universal Declaration of Human Rights (UDHR, 1948) continues to affirm that every human being is born equal in rights and protected in dignity (Article 1), all members of the human family are entitled basic rights and freedoms without discrimination on race, color, sex, language, religion, political opinion or all other views, nationality or social origin, property, lineage, or all other circumstances (Article 2). The principle of non-discrimination continues to be recognized in the two basic human rights conventions, the 1966 International Convention on Political and Civil Rights (ICCPR), and the International Covenant on Cultural and Social Rights, and economy 1966 (ICESCR). According to this principle, the member states of the United Nations must respect, protect and promote human rights without any discrimination and discrimination,

including the factor “sexual trend "and" gender identity ”<sup>2</sup>.

On the basis of international human rights, documents that directly address the rights of the LGBT community in general and transgender rights in particular have been adopted, typically: Declaration of Trends sexuality and human rights, approved by the United Nations Human Rights Committee in March 2005; The Universal Declaration of Human Rights Violations based on sexual trends and gender identity was adopted by the United Nations Human Rights Council in December 2006; The Joint Declaration on human rights, sexual trends and gender identity was adopted by the United Nations General Assembly on December 18, 2008; A joint statement on the end of acts of violence and human rights violations based on sexual trends and gender identity adopted by the United Nations Human Rights Council in March 2011; Resolution on "Human rights, sexual trends and gender identity" adopted by United Nations Human Rights Council in June 2011; Yogyakarta Code of Sexual Trends and Gender Identity, adopted by the United Nations Human Rights Council on March 26, 2007.

Directly related to transgender rights, the United Nations Human Rights Commission has urged countries to "recognize the right of transgender people to change their gender by allowing them to provide them with a new birth certificate." [Concluding observations of the Human Rights Commission with the national report of Ireland, UN Doc. CCPR / C / IRL / CO / 3, 30 July 2008, paragraph 8. 4 23/47 Human Rights Council members voted for this Resolution including: Albania, Belgium, Bolivia, Cuba, Ecuador, El Salvador, France, Georgia, Germany, Latvia, Mexico, Mongolia, Netherlands, Panama, Paraguay, Portugal, Republic of Korea, Slovenia, Switzerland, The former Yugoslav Republic of Macedonia, United Kingdom, Venezuela and Vietnam. ...]. The United Nations High Commissioner for Human Rights also recommends that countries should: “support the enforcement of the transgender's right to the legally recognized gender of their rights<sup>4</sup> and provide documents proving their gender identity and their desired name...”<sup>5</sup>. Most recently, on June 30, 2016, the UN Human Rights Council voted to pass resolution 32/2, which appointed an Independent Expert to promote violence and discrimination. Treatment based on sexual orientation and gender identity. Vietnam is one of the countries voting "yes" for this resolution.

From the analysis above, the conclusion can be drawn: Although international human rights instruments do not have specific provisions on the right to transgender, this right is considered

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<sup>2</sup> Office of the High Commissioner for Human Rights (2011), Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, A/HRC/19/41, para. 16, accessed 15 August 2013 at: [www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/AHR C-19-41\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/AHR C-19-41_en.pdf).

to be contained in some other human rights, especially the rights recognized before the law, the right to equality, non-discrimination, the rights of personal security ... In fact, the right to change sex and related rights such as changing identity documents to have a new name and gender, have been recognized by international organizations and human rights agencies.

## **II. SITUATION OF TRANSGENDER IN VIETNAM AND SOME COUNTRIES IN THE WORLD**

### **(A) Situation of transgender in Vietnam**

In Vietnam, the issue of gender change is focused on in the Civil Code (BLDS) and some guiding documents. Previously, Article 36 of the Civil Code 2005 provided that individuals have the right to be re-determined, but only if the gender is congenitally defect or not formulated correctly. In accordance with Article 36, Article 27 of the 2005 Civil Code, only people who are "redetermined" can change their first and last name (point e). Article 36 of the 2005 Civil Code was later concretized in the Government's Decree No. 88/2008 / ND-CP detailing gender reassignment, in which it is strictly forbidden to perform the sex reassignment. persons who have completed their gender and redefined without permission of the Ministry of Health or the provincial / municipal Health Services (Article 4).

From a scientific perspective, the prohibition of transgender as above does not comply with the standards of international human rights law and the general trend in the world, and has led to a series of consequences such as: For transgender people: Such prohibition leads to some transgender people not living up to their desired gender, causing psychological trauma and creating stigma and discrimination of society with them. In addition, due to domestic barriers, some transgender people seek to go abroad for surgery, which is often much more expensive. It is estimated that domestic sex reassignment surgery is now possible and costs 8-10 times cheaper than surgery abroad. [Source: [http://isee.org.vn/vi/Blog/Category/lgbt.](http://isee.org.vn/vi/Blog/Category/lgbt)], or have to undergo a "underground" operation in the country with many potential risks. Most transgender people who have had surgery abroad or undergone surgery in the country did not meet the requirements specified in Article 12 of Decree 88/2008 / ND-CP, so despite having surgery, they are still not recognized for their new gender and cannot change their names. Identity does not match the situation of the new body, which makes it very difficult for them in daily life, especially in civil transactions, and exposes them to the risks of abuse. harm such as rape, sexual abuse.

For society: Article 4 of Decree 88/2008 / ND-CP leads to the fact that a part of citizens is outside the management of civil status. In addition, the fact that the identity papers do not

match the new body condition not only makes it difficult for transgender people, but also makes it difficult for state agencies to handle cases related to transactions. civil rights of transgender people, including treating them in special circumstances, such as searching people and arranging housing in detention facilities to protect them from abuse of rights ID. Regarding the difficulties of transgender people, iSEE's survey conducted in August 2014 with 219 transgender people showed that:

- 80.3% of transgender people are dissatisfied with their birth name; 69.3% of ones have difficulty using that name; 86.3% of them wanted to change their name on paper, and 86.6% of transgender people thought that they needed to be changed without having to undergo sex change surgery.

- 78.1% of transgender people want transgender surgery, 11.1% of them have had at least one part of their body (chest, genitals or both), of which 100% Regarding genital (23 cases) performed overseas (Thailand and South Korea), 83.3% of breast-related surgeries (implants or excision) were performed in Vietnam. .

- Of the 219 surveyed people, 22 people (10.1%) tried to change the name but only one (01) success case (because their parents had registered to change their name before this person has ID card).

- Transgender people openly expressed their desired gender "often" (21.8%) or "occasionally" (46.8%) had difficulty with identification.

- Transgender people also "often" (24.2%) or "occasionally" (62.6%) were discriminated against because of their gender expression, in many forms.

In terms of ability to be protected before the law, 16.3% of transgender people have ever been sexually assaulted; 95.8% of transgender people want to be able to marry their lover because on current papers, the two are of same gender, of which 78.3% want to be married even if they do not change. be gender on paper. Especially when 42% of transgender women were detained or held together with men while in detention, custody or detention, more than one-third (35.6%) of them had surgery. at least one body part, while 58% of transgender people wanted it in a separate area and 38% of them wanted it in a female area. The opinion of transgender men is that 72.4% want to be in a separate area, 15.9% of them want to be in a female area and 11.7% of transgender people want to be in a male area.

On November 24, 2015, the National Assembly passed the new Civil Code 2015, which includes provisions on sex change. Specifically, Article 37 of the Civil Code 2015 stipulates: "Transsexuals are conducted in accordance with the law. Individuals who have changed gender

have the right and obligation to register for civil status change according to the civil status legislation; have gender-appropriate personal rights that have been converted in accordance with this Code and other relevant laws". With this provision, Vietnam became the 11th country and territory in Europe. Asia (after Iran, Israel, Syria, Nepal, China, South Korea, Japan, Taiwan, Philippines, Singapore), legalizing sex change.

Although there is no specific provision on transgender rights, the content of Article 37 of the Civil Code 2015 indirectly acknowledges this right. In that sense, Article 37BLDS 2015 reflects the human rights spirit of the 2013 Constitution, marking a new step in the issue of human rights in our country in the direction of conformity with international standards and trends. popular in the world. The new regulation is the basis for realizing many other human rights of transgender groups, such as the right to transgender surgery, the right to change name and gender in identification documents, the right to marriage, the right to adoption, etc. they haven't had it before.

#### **(B) Transgender in the laws of some countries**

According to iSEE's document, as of September 2015, most European countries, the Americas and many Asian countries have acknowledged the right to change their names and gender after transgender surgery under different conditions such as: : age requirements, marital status, sterilization, partial surgery. In particular, there are 61 countries that have legalized the change of name and gender on paper, ie without the need for transgender surgery. Some countries have allowed intersex people to choose a third gender (besides "male" and "female"), such as Australia (2011), New Zealand (2012) ... In Germany (2013 ), intersex children in the birth certificate may leave the gender part blank, when they grow up they can choose the gender "male", "female"<sup>3</sup>. According to Equaldex's statistics, as of December 2016, 60 countries have legalized the right to sex change, 95 countries have not legalized but not banned, 58 countries still prohibit transgender<sup>4</sup>.

In Europe, there are currently 38 countries that allow surgery to change the sex at will, and is accompanied by a derivative right to recognize the new name and gender on identification documents. These countries include all European Union member countries and some Union countries, except for Albania, Andorra, Armenia, Cyprus, Georgia, Kosovo, Macedonia, Monaco, San Marino and Serbia.<sup>5</sup> Currently in Europe, only a few countries, although transgender surgery is allowed, have not allowed the change of gender on identity papers. In

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<sup>3</sup> <http://isee.org.vn/vi/Blog/Category/lgbt>. 9 Nguồn: <http://www.equaldex.com/>.

<sup>4</sup> Theo Equaldex

<sup>5</sup> TGEU (Transgender Europe, cập nhật 24/04/2015). 11 Nguồn: [http://tgeu.org/trans-rights\\_europe\\_map\\_2016/](http://tgeu.org/trans-rights_europe_map_2016/).

addition, some countries still stipulate strict conditions for new sex recognition, such as: surgery, infertility, and celibacy. However, these regulations are increasingly being abolished, for alleged violations of the principle of body freedom. Many countries no longer require surgery (but still require a certification by a psychiatrist) to be admitted to a new gender, nor do they require sterilization when surgery or conditions are single. The age at which transgender people are allowed to decline also decreases, from a minimum of 21 to 20, 18, 16 because studies have shown that gender identity can be confirmed very early, and transgender is implemented. The right time will reduce depression and stigma from those around you.

In Asia, many countries have admitted new sex after surgery, such as Japan, China, Singapore, Philippines ... while some countries and territories do not require surgery to change the gender in paper. sheets, such as Korea, Taiwan, Israel ... Even in China, so far there is no law prohibiting transgender surgery. In 2002 and 2008, the Ministry of Public Security of China issued two guidelines on changing sex on household registration books and identification cards, after realizing that transgender people had difficulty registering for replacement. Change of civil status. According to these documents, after being successfully transformed on paper, transgender people have all the rights and obligations under the new gender, including marriage. It is estimated that there are about 400,000 transgender people in the world's most populous country. However, in 2009, the Ministry of Public Security of China issued a number of stricter regulations on transgender issues, including the condition that people must be over 20 years old, have no criminal records, and must live publicly with their expected gender at least 3 years before surgery, and must complete the surgery process before changing papers. This regulation is considered by experts to be too harsh, because according to the official guidelines of the Specialized Association for Transsexual Health, only three conditions are needed, that is: 12 consecutive months of public life as your desired gender, hormone therapy and a certification from a psychologist.

In South Korea, in 2006, the Government issued a legal document stipulating that transgender people can make changes to their gender on paper when undergoing surgery to resemble the "external genitalia" of gender that I want to switch to. Although this provision is considered a step forward in transgender issues, the fact is that not everyone has enough money to perform surgery, especially surgery from women to men. So in 2013, the Supreme Court ruled that a person doesn't need to have sex to change gender on paper after considering a lawsuit where the plaintiffs are 5 transgender people, all of whom have not undergone surgery. In the Americas, over the past 10 years, the number of countries that have legalized transgender rights has continued to increase, up to now there are 11/53 countries, including countries like Cuba -

where transgender activities are not only allowed, but also are paid for surgery by the State.

In Oceania, both the largest countries, Australia and New Zealand, have legalized transgender (Australia: 1987, the cost of surgery is also paid by the State; New Zealand: 1993).

Particularly in Africa, only South Africa currently legalized this right (since 2003). Under South African law, sex reassignment is not required for surgery.

### **III. SOME SOLUTIONS AND RECOMMENDATIONS TO IMPROVE THE LAW ON TRANSGENDER IN VIETNAM TODAY**

#### **(A) Proposing the National Assembly and the Government to draft, formulate and promulgate the Law on Transgender in Vietnam**

- *Regarding the name of the Law:* With the question How will the law be built with the name? "The law of changing sex", or "the law of changing sex". Firstly, lawmakers must identify the role, position, purpose and subject of the law. Therefore, legislators and scientific researchers must explain Article 37 of the Civil Code 2015 to develop the Law as most appropriate. With the content of Article 37 of the Civil Code 2015, we see three main legal issues: Firstly, it is "recognition of transgender", and here it is necessary to clarify the meaning of the law is to recognize gender change. From a legal perspective ("gender change" is the correct use of the word in this case) or a gender change recognition from a medical perspective. Secondly, "transgender people must be obliged to register to change civil status again." Thirdly, transgender people have personal rights attached to the new sex.

- *Structure and content of the Law:* A range of people who are recognized for changing gender; Agencies competent to make decisions or decisions recognizing gender change should also be specified in the Law. Along with the identification of a competent authority, regulations regarding procedures and sequences will be established when a person diagnosed with a gender disorder submits a sex change request; Conditions for a person to be diagnosed with a gender disorder to apply for a change of gender: (1) Conditions of age, (2) Conditions related to family relationships, (3) Conditions related to medical intervention ...; The legal effect of a gender change decision or judgment.

In addition, the content related to sex change includes the following issues: Subjects eligible for sex change; The concept of "sex change" in Vietnamese law from a medical perspective and from a legal perspective. Specifically, it is through the steps of treatment at which stage is recognized as sex change. For example: The first phase of psychotherapy or the second phase of hormone injections, or must undergo transgender surgery; Develop regulations related to

standards of physicians conducting stage diagnosis and treatment recognized as transgender; Rights and obligations of health facilities, of physicians; Agencies competent to issue decisions recognizing "transgender"; Procedures conducted to be issued a decision recognizing "sex change".

- *Content related to the legal effect of the decision on recognition of gender change:* Rights and obligations of the person after changing gender. However, the following obligations must be clearly stated: The obligation to change the gender in the relevant personal papers such as birth certificates, civil status, identity cards, passports, social insurance books, health insurance card...; Do not return to the original gender in any way; The decision to "change sex" has no retroactive effect.

**(B) Completing the provisions of the law on transgender conditions, processes and procedures.**

- State the conditions for the recognition of transgender people. In this regard, the Law should not associate transgender rights with surgery, as analyzed in section 1 of this article, many transgender people have a gender identity that differs from biological sex but they are completely satisfied with biologic characteristics or do not want surgery due to health concerns or financial ineligibility. The provision to be recognized as transgender people requires surgery to limit the rights of transgender groups who do not want or cannot afford surgery, thereby making the transgender provisions in Article 37 of the Civil Code 2015 half-hearted and discriminatory in nature.

- Stating legal, health and social processes, procedures for identifying transgender people. In principle, these procedures and procedures need to be simple and convenient for transgender people, but they also need to be able to prevent outrageous, immature, and unjustified decisions, especially in transsexual surgery cases. In this regard, it is recommended to consider applying the three conditions in the official guidelines of the Specialized Society for Transsexual Health (mentioned above), namely: at least 12 consecutive months of public life like your desired gender, using hormone therapy and a certification from a psychologist.

- Identify legal procedures and procedures for the transfer of identification documents after transgender. These processes and procedures also need to be most convenient for them, but also need to ensure the uniformity and coherence of state management activities.

**(C) Complete the legal provisions on the prohibitions in transsexual activities in Vietnam**

Stating rules prohibiting discrimination and measures against discrimination against transgender people. In this regard, although the issue of anti-discrimination in general has been

stipulated in the Constitution and specialized laws, but because transgender is a new issue, there are very specific aspects, so the Law Regarding gender change, there should still be separate regulations on rights and obligations / responsibilities of stakeholders to ensure effective prevention of transgender discrimination. out in society. The revised Civil Code was passed by the National Assembly of Vietnam on November 24, 2015 and takes effect from January 1, 2017. This law is considered the legal basis for promoting democracy, ensuring social equality and human rights. The drafting process involved transgender individuals in consultation meetings on amendments to the law. Policy activists have the opportunity to hear and consider the real voices and real cases of transgender communities<sup>6</sup>.

**(D) Further enhance the roles of leaders, managers, respect and protection of human rights of transgender people.**

- *Respect, protect and ensure the human rights of transgender people.* The requirements imposed on individuals wishing to be transgender need to be kept to a minimum, enabling transgender people to enjoy their human rights, namely the rights of physical integrity, privacy and family life; the right to the highest possible standard of health.

- *Separate legal and medical procedures for legal recognition of transgender people, and use a modern, humane approach to legal gender recognition of transgender people .* Vietnam's transgender law recommendations should provide a legal framework that allows transgender people to be legally recognized for their gender through a fast, transparent and accessible procedure. With this approach, laws need to eliminate requirements such as requiring sterilization and medical requirements in order to be legally recognized sex. For example, requests for mental evaluations, psychiatric diagnostics. Transgender identification should be excluded from the classification of mental health disorders. It is important to ensure that transgender people have access to the medical interventions they desire based on their explicitly agreed consensus.

- *There is strong political will from leaders on transgender rights and identifies Vietnam as one of the Southeast Asian countries pioneering LGBT human rights issues.* Norwegian experience shows that real change in legal awareness requires strong political will of the leadership. Since the 1970s, Norway has asked the University of Oslo Hospital to certify to the Norwegian Tax Office that "a true transgender" has occurred - based on surgeries and mental evaluations. God. This request is said to have put transgender Norwegian into a

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<sup>6</sup> <https://www.usaid.gov/results-data/success-stories/vietnam-recognizestransgender-identity-rights> (access on 10/11/2016)

nightmare of bureaucratic procedures and deprived them of their free will. In the 2016 revised health bill, Norwegian Health Minister Bent Høie stated: Norway is a pioneer in the field of same-sex, bisexual and transgender rights. But our current system of transgender is unacceptable and hasn't changed in nearly 60 years. This draft is in line with human rights.”<sup>7</sup>

*- Raise awareness and basic understanding of transgender issues to minimize progress towards eliminating transgender stigma.* Awareness raising activities for organizations, individuals and society in general on transgender issues to eliminate gender-based stigma. For example, it is important to understand that transgender people are people whose desires are different from the gender at birth. For example, being born a male and thinking of you as a woman, or being born a woman and thinking that you are a man. Transgender people are different from gay people. Transgender is related to "who you think you are" (perceived sex), while homosexuals relate to "who you love" (emotional attraction). Transgender people do not have to be born with a disability. It is important to understand that transgender is not a disease or a distortion, a psychological disorder. Each person has the right to have his or her own unique sense of gender. Transgender people need support to live up to their desired gender, to show their desired gender and to reduce prejudice and stigma. Transgender people includes people who have not had transgender surgery. Transgender people do not necessarily have to undergo surgery because they do not have all the economic and health conditions or the need for full transgender surgery<sup>8</sup>.

#### IV. CONCLUSION

In the trend of progressive progress, more and more countries around the world recognize the rights of transgender people. International studies show that the overall rate of transgender people accounts for about 1-2% of the population. Although it is difficult to accurately estimate the number of transgender people in society, it is a fact that transgender people present at all historical and cultural stages, including Vietnam. Transgender people are part of society. Their human rights must be respected, including their legal right to gender identity. The lack of legal recognition for transgender people puts this minority in society burdened with violence, discrimination and negative health consequences. Basic legal dignity of the person must be recognized for transgender people.

Legal recognition of gender is growing rapidly globally as governments begin to fulfill their commitment to the core idea that no state or person can determine each individual: who they

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<sup>7</sup> <http://www.thelocal.no/20160318/norway-to-allow-gender-changewithout-medical-intervention> (access on 30/6/2016).

<sup>8</sup> iSEE/ICS – “Quickly answer questions about transgender” [www.isee.org.vn](http://www.isee.org.vn); [www.ics.org.vn](http://www.ics.org.vn).

are. Countries like Norway are creating a road map for other countries to refer to their previous experiences and follow them to the highest possible level. Vietnam can completely refer to and refine from the experience of other countries to develop a modern and humane transgender law.

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