

Criminal Legal Issues Of Homosexual And Transgender People Under Vietnamese Law

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Abstract

The legal system of Vietnam in general, and criminal law in particular, has started to include provisions regarding legal responsibilities towards homosexual and transgender individuals. However, the specific regulations within the laws and the application methods in particular cases are highly complex. In modern society, the rights of homosexual and transgender individuals are increasingly recognized and given more attention. However, similar to some other areas, the rights of homosexual and transgender individuals in the criminal field are still a neglected issue. Therefore, for the first time, the Criminal Code of Vietnam in 2015 introduced the provision of 'other sexual relations' to protect the rights and determine the criminal responsibility of offenders towards homosexual and transgender individuals. This study focuses on clarifying the legal issues regarding homosexual and transgender individuals in criminal law and based on that, presents some proposals for improving the legal framework.

Keywords: Gender, homosexuality, transgender, criminal law, Criminal Code of 2015 (2017).

1. Introduction

On May 17, 1990, the World Health Organization (WHO) removed "homosexuality" from the list of mental disorders. Nowadays, people who are concerned and informed no longer consider homosexuality as a pathology or physical disability. If we were to "classify," homosexuality is considered a different sexual orientation [1].

In recent times in Vietnam, the LGBTQ+ community, including homosexual and transgender individuals, has become more visible in society. The number of transgender individuals or those openly expressing their sexual orientation has been increasing. The issue of ensuring the rights of homosexual and transgender individuals has also been frequently discussed and emphasized by Western countries in human rights dialogues, seminars, and discussions with Vietnam. Therefore, to align with international law and changing developments in reality, Vietnamese laws have gradually approached and recognized the general human rights and the rights of the LGBTQ+ community, including homosexual and transgender individuals. This has been achieved through the recognition and protection of human rights and citizenship in the 2013 Constitution.

However, the Vietnamese Criminal Code of 2015 (amended and supplemented in 2017) has made significant progress in safeguarding the sexual freedom of all individuals, including those in the LGBT community. "Other sexual relations" that involve non-consensual acts (using force, threatening the use of force, taking advantage of the victim's vulnerable situation, etc.) are criminalized under the provisions of rape, sexual assault, and other related offenses. Resolution No. 06/2019/NQ-HĐTP dated October 1, 2019, issued by the Judicial Council of the Supreme People's Court, specifies what constitutes sexual intercourse, other sexual relations, and sexual harassment. While it does not directly mention individuals belonging to the LGBT community, these new provisions in criminal law contribute to protecting them from non-consensual "other sexual relations" that violate their physical and mental well-being, honor, and dignity in their daily lives and even in detention environments where they are at high risk of sexual abuse.

2. Contents

2.1. Homosexuality

Currently, the majority of people in society are non-heterosexual (and many believe that only non-heterosexuality is natural). In contrast, the homosexual group represents a minority in society (considered by many as unnatural). However, it should be affirmed that these are all natural sexual orientations of human beings. For example, on May 17, 1990, the World Health Organization (WHO) removed homosexuality from the list of mental disorders [2]. A person can have a male or female gender identity and still be non-heterosexual, homosexual, bisexual, or asexual. The perception of which sexual orientation is natural is often due to a lack of knowledge and understanding, leading to a focus only on non-heterosexuality while ignoring or stigmatizing less common sexual orientations.

From a scientific perspective, according to the American Psychological Association (APA), homosexuality is not a psychopathological disorder but a natural biological phenomenon influenced by complex interactions of genetic and prenatal environmental factors during early fetal development [3]. Same-sex sexual behaviors and same-sex romantic relationships are normal forms of bonding that fulfill basic human needs for love, intimacy, and care. The APA does not provide a scientific explanation for this phenomenon but presents evidence and research to conclude the inherent existence of these sexual orientations, aiming to remove homosexuality from mental disorder classifications and providing social guidance to help same-sex attracted individuals integrate into society and foster greater understanding and empathy for them. The APA removed homosexuality from the list of symptoms and mental disorders in 1973. Furthermore, in December 1992, the APA issued a call for global action to protect the rights of homosexual individuals [4]. The results of psychological, pediatric, and sociological research, surveys, and statistics have all led to the conclusion that homosexuality is not a mental disorder but a normal phenomenon in nature. People with these sexual orientations do not choose them subjectively. Therefore, it can be reaffirmed that homosexuality is not a third gender as many people think, nor is it a trend. Biologically, homosexual individuals are still either male or female.

2.2. Transgender Individuals

Different from homosexual or bisexual individuals, understanding transgender individuals requires understanding the concept of gender identity. This term refers to when a person identifies themselves as a certain gender (which may be the same or different from their assigned sex at birth). From this perspective, in general, if a person is born and identifies with the gender that matches their assigned sex at birth, and has feelings and emotions towards individuals of the same gender, then that person is homosexual. If this person has feelings towards individuals of a different gender, then they are heterosexual. However, if the individual in question identifies with a gender different from their assigned sex at birth, then they are transgender [5]. Similarly to sexual orientations, gender identity is one of the four factors of sexuality. The variations in gender identity are completely natural in society. Therefore, if someone has awareness and a desire to have a gender different from their assigned sex at birth, it is also considered normal. After undergoing surgery, transgender individuals are referred to with a more comprehensive term: "gender transition."

There are two forms of transgender individuals: male-to-female transgender and female-to-male transgender. From a sexual orientation perspective, they can be further categorized as transgender homosexual individuals (for example, individuals transitioning from male to female and exclusively attracted to females), transgender bisexual individuals (for example, individuals transitioning from male to female and capable of being attracted to both males and females), and transgender heterosexual individuals (for example, individuals transitioning from female to male and exclusively attracted to females).

In some countries, transgender individuals can change their identification documents without undergoing surgery. However, other countries require gender confirmation surgery for recognition. It can be observed that although transgender individuals and gender transition exist in every society and all around the world, these concepts are still widely misunderstood and confusing even for the individuals themselves when they cannot determine their gender identity [6]. In general, "transgender" is a term with a broad scope [7].

The majority of cases where men often cross-dress or present themselves as women, or vice versa, are transgender individuals. Except for some individuals who cross-dress to meet work or entertainment needs (they may be gender nonconforming, homosexual, or bisexual), most of these individuals are transgender. As mentioned, because transgender individuals have a perception and desire for a gender opposite to their assigned sex, they engage in cross-dressing. In these cases, they do not undergo gender confirmation surgery either due to legal restrictions or lack of financial means.

2.3. Legal Issues in Criminal Law Regarding Homosexual and Transgender Individuals

The Criminal Code of 2015 (amended and supplemented in 2017) has made significant progress in ensuring the sexual freedom rights of all individuals, including those in the LGBT community. Any non-consensual sexual acts (using force, threatening the use of force, taking advantage of the victim's helpless situation, etc.) are criminalized under the provisions of rape offenses outlined in Articles 141, 142, sexual assault offenses in Articles 143, 144, and sexual intercourse or engaging in other sexual acts with a person aged between 13 and under 16 in Article 145. Resolution No. 06/2019/NQ-HĐTP dated October 1, 2019, issued by the Judicial Council of the Supreme People's Court, clarified the definitions of sexual intercourse, other sexual acts, and sexual harassment. Although it does not directly address homosexual or transgender individuals, these new legal provisions contribute to protecting them from any non-consensual sexual acts that violate their physical and mental well-being, dignity in daily life, and particularly in detention facilities, where they are at high risk of sexual abuse. According to the provisions of the current Criminal Law, homosexual and transgender individuals are also subjects or victims of criminal offenses, especially sexual offenses, in the form of "engaging in other sexual acts" in the following cases:

Firstly, unlawful sexual acts between individuals of the same gender or transgender individuals. Among sexual offenses, rape is one of the most serious and dangerous crimes. According to the provisions of the current criminal law, rape can still be committed even without sexual intercourse. As guided in Resolution 06/2019/NQ-HĐTP, sexual intercourse is the penetration of the

male sexual organ into the female sexual organ, regardless of the degree of penetration. Engaging in sexual intercourse with a person under 10 years old is considered as having been committed, regardless of whether penetration has occurred or not. Therefore, there are two scenarios where rape and sexual assault can be committed without actual sexual intercourse. Currently, the Criminal Law of 2015 (2017) stipulates two types of rape offenses: Rape (Article 141) and Rape of a person under 16 years old (Article 142); two types of sexual assault offenses: Sexual assault (Article 143); Sexual assault of a person aged between 13 and under 16 (Article 144), and Sexual intercourse or engaging in other sexual acts with a person aged between 13 and under 16 (Article 145). Specifically:

Regarding the offense of rape

According to Article 141 of the Criminal Code, anyone who uses force, threatens to use force, or takes advantage of the victim's inability to defend themselves or employs other methods to have sexual intercourse or engage in other sexual acts against the victim's will commits the crime of rape.

The punishment for this offense is imprisonment from 2 to 7 years. In cases where aggravating factors are present, such as causing injury to the victim, causing the victim to become pregnant, or leading to the victim's suicide, the offender may be sentenced to up to 20 years in prison, life imprisonment, or death penalty.

Regarding the offense of raping a person under 16 years old

According to Article 142 of the Criminal Code, anyone who commits one of the following acts commits the crime of raping a person under 16 years old:

Using force, threatening to use force, or taking advantage of the victim's inability to defend themselves or employing other methods to have sexual intercourse or engage in other sexual acts with a person aged between 13 and under 16 against their will.

Having sexual intercourse or engaging in other sexual acts with a person under 13 years old.

The punishment for this offense is imprisonment from 7 to 15 years. In cases where aggravating factors are present, such as causing injury to the victim, causing the victim to become

pregnant, or leading to the victim's suicide, the offender may be sentenced to up to 20 years in prison, life imprisonment, or death penalty.

Based on the above provisions, there are two scenarios in which the perpetrator can still be criminally prosecuted for the offense of rape or the offense of raping a person under 16 years old, even if sexual intercourse has not been performed. These scenarios involve engaging in other sexual acts against the victim's will and engaging in other sexual acts with a person under 13 years old. In order to guide the handling of cases related to sexual offenses, Resolution 06/2019 of the Judicial Council explains that engaging in other sexual acts refers to the acts of individuals of the same or different gender using the male sexual organ, other body parts (such as fingers, toes, tongue...), or sexual devices to penetrate the female sexual organ, mouth, or anus of another person, regardless of the degree of penetration. It includes the following acts: inserting the male sexual organ into another person's mouth or anus, using other body parts (such as fingers, toes, tongue...), or sexual devices to penetrate the female sexual organ, mouth, or anus of another person.

Regarding the offense of sexual coercion

According to Article 143 of the Criminal Code, anyone who uses any means to force a dependent person or a person in a helpless situation to engage in sexual intercourse or perform other sexual acts against their will commits the crime of sexual coercion.

The punishment for this offense is imprisonment from 1 to 5 years. In cases where aggravating factors are present, such as incestuous nature, causing the victim to become pregnant, causing the victim's death, or leading to the victim's suicide, the offender may be sentenced to up to 18 years in prison.

Regarding the offense of coercing a person under 16 years old

According to Article 144 of the Criminal Code, anyone who uses any means to force a person aged between 13 and under 16, who is in a dependent or helpless situation, to engage in sexual intercourse or perform other sexual acts against their will commits the crime of coercing a person under 16 years old.

The punishment for this offense is imprisonment from 5 to 10 years. In cases where aggravating factors are present, such as

incestuous nature, causing the victim to become pregnant, causing the victim's death, or leading to the victim's suicide, the offender may be sentenced to up to 20 years in prison or life imprisonment.

Therefore, if any of the above-mentioned sexual acts are performed with a person aged 13 or older, even without actual intercourse, the perpetrator will be held criminally liable for the offense of rape or the offense of raping a person under 16 years old, as well as the offense of sexual coercion or coercing a person under 16 years old. Additionally, in cases where sexual acts are performed with a person under 13 years old voluntarily, individuals aged 14 or older can still be criminally prosecuted for the offense of raping a person under 16 years old.

Secondly, engaging in unlawful sexual intercourse with a person who has undergone gender reassignment surgery is also a reality in Vietnam.

In addition to recognizing an individual's right to gender reassignment, Article 37 of the Civil Code of 2015 also acknowledges: "Individuals who have undergone gender reassignment have the right and obligation to register changes in their household registration according to the provisions of the nationality law; they have the right to a suitable personal identity in accordance with the gender they have transitioned to, as stipulated in this Code and other relevant laws." This is the legal basis to ensure the personal rights of individuals who have undergone gender reassignment regarding nationality, marriage, and family. However, in reality, there are still no specific legal documents regulating these issues. As a result, many Vietnamese people have traveled abroad to undergo surgery to transition from male to female or from female to male. When these individuals return to Vietnam, according to current regulations, they encounter difficulties in the process of updating their identification documents, leading to a situation where some individuals who have undergone gender reassignment have outward appearances and sexual organs of one gender, but their national ID cards, passports, and birth certificates still state their assigned gender at birth. Therefore, in practice, there have been cases where a person who has undergone gender reassignment from male to female is subjected to sexual intercourse by another male, resulting in difficulties in criminal prosecution.

The author argues that the act of engaging in sexual intercourse without consent with a person who has undergone gender reassignment from male to female is essentially similar to the act of engaging in sexual intercourse without consent with cisgender women. Both acts violate the dignity and humanity of individuals, infringe upon their freedom and inviolability of sexual rights, so depending on the manner in which the criminal act is carried out, it may constitute the offense of rape or the offense of sexual coercion.

Thirdly, the act of "purchasing sex" from a minor of the same gender, procuring or managing prostitution of a minor of the same gender.

According to the Law on Prevention and Control of Prostitution in 2003, prostitution refers to the act of sexual intercourse between one person and another in exchange for money or other material benefits; purchasing sex refers to the act of using money or other material benefits to pay for sexual intercourse with a sex worker; and procuring refers to the act of engaging in either buying or selling sex. Therefore, in order to prosecute offenses related to the purchase of sex from minors, procuring or managing prostitution, there must be evidence of a person using money or other material benefits to engage in sexual intercourse with another individual.

Currently, there is a situation where a person uses money or other material benefits to engage in acts that are similar in nature or circumstances to sexual intercourse (such as oral or anal sex) with a person of the same gender - often referred to as "same-sex prostitution." However, according to the provisions of the Law on Prevention and Control of Prostitution, such acts are not considered "prostitution" in the legal sense because there is no sexual intercourse involved [8].

The phenomenon of "same-sex prostitution," especially male same-sex prostitution (where males sell sex to males), is complex, rapidly increasing, and poses significant dangers to society, disrupting public order and security. Particularly, the activities of male same-sex prostitution groups often take place clandestinely to avoid community stigma, limiting disease control measures. Therefore, the risk of HIV/AIDS transmission in male prostitution is higher compared to female prostitution. According

to the assessment of the Committee for HIV/AIDS Prevention and Control, the infection rate among male homosexuals is 20 times higher than that of female sex workers and drug users. In practice, under the current provisions of the Criminal Law of Vietnam, it is not possible to prosecute individuals who procure or manage same-sex prostitution, purchase sex from a minor of the same gender, for the corresponding crimes of procuring prostitution (Article 327), managing prostitution (Article 328), or purchasing sex from a person under 18 years old (Article 329) because there is no sexual intercourse involved. This situation requires the amendment of the provisions of the Law on Prevention and Control of Prostitution to establish a legal basis for the criminal prosecution of offenses related to the purchase of sex from minors, procuring or managing prostitution (of the same gender).

Fourthly, the behavior of homosexual individuals who register cohabitation with one person but marry another.

Currently, according to the provisions of the Law on Marriage and Family, marriage is the establishment of a husband-wife relationship between a man and a woman in accordance with the legal requirements for marriage and marriage registration. The state does not recognize marriage between individuals of the same gender. However, in reality, there is an increasing number of same-sex couples openly living together as husband and wife, even organizing wedding ceremonies, although not recognized by the state and the law. During their cohabitation, they also establish shared assets and have rights and obligations similar to those of a husband and wife (typically with one person assuming the role of a wife and the other assuming the role of a husband in a same-sex marriage relationship). The state's non-recognition of this marital relationship has caused difficulties when one or both individuals no longer live together, or when one or both individuals marry or cohabit with another person.

According to the author, the Law on Marriage and Family needs to recognize same-sex marriage relationships and allow them to register cohabitation as husband and wife. In that case, in the field of criminal law, if one or both individuals in a same-sex marriage relationship marry or cohabit with another person and it results in serious consequences, or if they have been administratively punished or convicted of this offense and the

criminal record has not been expunged, they should be prosecuted for violating the one-husband-one-wife marriage regime.

2.4. Homosexual and transgender individuals in criminal law in some countries

In Thailand:

In 2017, Bangkok was dubbed the second most gay-friendly city in Asia, after Tel Aviv, Israel, due to its open and safe policies for the LGBT community.

In 2016, Paisarn Likhitpreechakul, a board member of the Sogi Foundation, wrote an op-ed in the Bangkok Post warning about the widespread use of what is known as "corrective rape" to "cure" lesbian individuals according to their sexual orientation. He emphasized the case of a father in Loei who admitted to raping his 14-year-old daughter for four years to prevent her from associating with tomboys. Paisarn expressed further concern that such behaviors were being normalized in Thai society, and the actual number of such cases is much higher. Many cases of violence against the LGBT community in Thailand are categorized as crimes of passion because the Thai legal system does not include the concept of "hate crimes." The United Nations Office of the High Commissioner for Human Rights has identified killings, beatings, kidnappings, rape, and sexual assault against LGBT people as examples of homophobic and transgender violence, noting that violence against LGBT people tends to be particularly brutal compared to other biased-motive crimes [9].

In China:

According to the amended Criminal Law of China, starting from November 1, 2015, sexual assaults targeting males will be included in the list of criminal offenses.

The legal amendment was passed by the Supreme People's Court of China in August. Perpetrators of sexual assaults against male or female victims can now be sentenced to at least five years in prison. Previously, Chinese law only considered cases of sexual assault against female victims. In the past, there have been several cases related to sexual assaults against males in China that were not investigated or prosecuted. In 2010, a security guard sexually abused his male colleague in a dormitory but received only a 12-month prison sentence for intentionally causing injury. Prior to

that, a man in Sichuan was robbed and raped by another man. The perpetrator was also not charged with sexual assault. Furthermore, China's criminal law amendment has reclassified the offense of having sexual relations with underage prostitutes as statutory rape of minors. Previously, in China, the crime of having sexual relations with a prostitute under the age of 14 was punishable by a maximum of 15 years in prison. With the new charge of statutory rape of minors, the perpetrator can be sentenced to death [10].

2.5. Solutions to improve criminal laws related to homosexuals and transgender individuals

Firstly, it is necessary to supplement the content for the principle of ensuring equality before the law - adding the requirement of non-discrimination based on sexual orientation, gender identity, and non-conformity to traditional notions of binary gender. For example, Article 3 of the 2015 Criminal Code on the principle of prosecution (for offenders) can be revised as follows: "All offenders are equal before the law, without discrimination based on gender, sexual orientation, ethnicity, religion, social status, or background." In addition, non-discrimination based on sexual orientation also calls for research and supplementation of aggravating circumstances for criminal acts motivated by hatred towards minority communities in society. Specific guidelines should be added regarding "gender-based motives," including biases related to gender, gender identity, and sexual orientation in the Crime of Violating Gender Equality Rights under the Criminal Law. The criminal law can also expand the grounds for considering the suspension of prison sentences for individuals undergoing incomplete gender reassignment surgeries [11].

Secondly, the act of engaging in sexual intercourse without consent with transgender individuals who have transitioned from male to female should be treated in essence similarly to the act of engaging in sexual intercourse without consent with women. It violates the dignity, honor, and human rights of individuals, infringing upon their sexual autonomy, and therefore, depending on the manner in which the criminal act is committed, it may constitute the crimes of rape or sexual assault. However, if laws regarding gender transition and procedures for identity documents are enacted and implemented early in practice, it

would prevent unnecessary difficulties and debates when determining the charges for the aforementioned acts.

Thirdly, Article 3 of the Law on Prevention and Control of Prostitution needs to be amended as follows:

- First, engaging in prostitution is the act of sexual intercourse between one person and another, or engaging in sexual activities that, in terms of nature and general circumstances, are similar to engaging in intercourse for payment or other material benefits.

- Second, soliciting prostitution is the act of using money or other material benefits to obtain sexual intercourse from a sex worker, or engaging in sexual activities that, in terms of nature and general circumstances, are similar to engaging in intercourse.

The amendment of the Law on Prevention and Control of Prostitution as mentioned above will serve as a legal basis for prosecuting offenses such as same-sex pimping or harboring of sex workers, purchasing sexual services from underage same-sex individuals, corresponding to the relevant crimes of pimping (Article 327), soliciting prostitution (Article 328), or purchasing sexual services from individuals under 18 years old (Article 329) as stipulated in the 2015 Criminal Code (2017). This will contribute positively to the fight against crime, the maintenance of social order and security, and the protection of the lawful rights and interests of underage same-sex individuals.

Fourthly, the Law on Marriage and Family should recognize same-sex marriage relationships and allow them to register their marriages according to the regulations applicable to heterosexual couples (without violating other marriage conditions). In the field of criminal law, if one of the individuals in a same-sex marriage relationship registers or cohabitates with another person (whether same-sex or heterosexual) in a manner that causes serious consequences, has been administratively punished, or has been convicted of this offense without having their criminal record expunged, and also violates the provisions on violating the monogamous marriage regime (one spouse, one husband), they shall be subject to criminal prosecution.

3. Conclusion

Gender issues and mechanisms for ensuring the rights and legitimate interests of homosexuals and transgender individuals are not new in Vietnam, but the awareness of this group still faces certain shortcomings and limitations. Homosexual and transgender individuals constitute a significant portion of society. However, their legitimate rights and interests have not been adequately addressed by the state and society, leading to many individuals living in disgrace amidst social discrimination, including within their own families. In the field of criminal law, protecting the rights and interests of homosexuals and transgender individuals will contribute to better safeguarding human rights in general, the rights of transgender and homosexual individuals in particular, as well as determining their criminal responsibilities if they commit acts constituting specific offenses defined in the current Criminal Code.

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